No. ________

In The
Supreme Court of the United States

MEGAN MAREK,

Petitioner,

v.

SEAN LANE, on behalf of himself and
all others similarly situated, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Civil Procedure 23(e)(2) requires that a settlement that binds class members must be "fair, reasonable, and adequate." In this case, the Ninth Circuit upheld approval of a settlement that disposed of absentee class members' claims while providing those class members no relief at all. Breaking with decisions of the Second, Third, Fifth, Seventh, and Eighth Circuits, the Ninth Circuit held that the settlement's award of $6.5 million to establish a new foundation controlled by the lead defendant and class counsel was a fair and adequate remedy under the trust-law doctrine of *cy pres*. The question presented is:

Whether, or in what circumstances, a *cy pres* remedy that provides no direct relief to class members comports with the requirement of Rule 23(e)(2) that a settlement that binds class members must be "fair, reasonable, and adequate."

PARTIES TO THE PROCEEDING

Petitioner Megan Marek was an objector in the district court proceedings and appellant in the court of appeals proceedings.

Respondents Sean Lane, Mohannaed Sheikha, Sean Martin, Ali Sammour, Mohammaed Zidan, Sara Karrow, Colby Henson, Denton Hunker, Firas Sheikha, Hassen Sheikha, Linda Stewart, Tina Tran, Matthew Smith, Erica Parnell, John Conway, Phillip Huerta, Alicia Hunker, Megan Lynn Hancock, a minor, by and through her parent Rebecca Holey, Austin Muhs, Catherine Harris, Mario Herrera, and Maryam Hosseiny were named plaintiffs in the district court proceedings and appellees in the court of appeals proceedings.

Respondents Facebook, Inc., Blockbuster, Inc., Fandango, Inc., Hotwire, Inc., STA Travel, Inc., Overstock.com, Inc., Zappos.com, Inc., and Gamefly, Inc. were defendants in the district court proceedings and appellees in the court of appeals proceedings.

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PETITION FOR A WRIT OF CERTIORARI

A $9.5 million class action settlement that awards absentee class members no relief at all – no money, no guarantee that defendants will not injure them in the exact same manner, not even coupons – is not "fair, reasonable, and adequate" by any measure. Yet the Ninth Circuit upheld such a settlement of class members' claims because class counsel and the lead defendant agreed to use $6.5 million to establish a new foundation, controlled by the defendant and class counsel, that also does nothing to combat defendants' alleged conduct or redress class members' alleged injuries. (The bulk of the remainder of the settlement proceeds, of course, went to class counsel as fees.) That award, it held, was the "next best distribution" of the settlement funds, short of providing actual payments to class members, and was therefore justified by the *cy pres* doctrine, which lower courts increasingly rely upon to direct class action settlement proceeds to third parties selected by attorneys or by the courts themselves.

For good reason, every other court of appeals to consider class action settlements containing similarly problematic *cy pres* awards has rejected them. *See generally* Sylvia Hsieh, Class Action Settlements Face Growing Scrutiny by Objectors, Courts, Lawyers USA, Mar. 31, 2013 (noting circuit split). Those courts' decisions have recognized that *cy pres* awards require special scrutiny because they can facilitate tacit or explicit collusion between defendants, who are eager to settle at the lowest price and with a minimum of fuss, and class counsel, who are seeking to maximize their fees and may be willing to accommodate defendants' desires in exchange for a "clear sailing" agreement not to challenge the fee request. They recognize that, in this way, *cy pres* awards present a heightened risk of conflict between class counsel and their putative clients, the members of the class. They recognize that open-ended *cy pres* awards, such as to entities without a track record of service or those controlled by class counsel or defendants, may provide little or no benefit to class members. And above all else, they recognize that *cy pres* awards to third parties are not appropriate when any reasonable opportunity remains to compensate class members directly for their injuries – always the first-best use of settlement funds.

By contrast, the Ninth Circuit's opinion in this case brushed aside all such concerns. Addressing them, it said, would be "an intrusion into the private parties' negotiations" and therefore "improper and disruptive to the settlement process." App. 14. It is "unremarkable," the court said, that a *cy pres* award may actually serve to advance the defendant's interests. App. 16. Even the availability of $2,500 in statutory damages for some class members' claims, it said, does not render a settlement that directs every last dollar to third parties or class counsel unfair in any respect. App. 18-19. All that matters is that a *cy pres* award "bears a substantial nexus to the interests of the class members," App. 14, which in this case the court viewed broadly to encompass a campaign –

again, controlled in part by defendants – to educate the public about "user control" over Internet privacy, when class members' complaint was that the defendants had unlawfully *denied them control* over disclosure of their personal information.

If allowed to stand, the circuit split created by the Ninth Circuit's decision creates an enormous incentive for forum-shopping by plaintiffs' attorneys seeking to sue and settle nationwide class actions like this one. Bringing suit within the Ninth Circuit's footprint now guarantees that minor things like compensating class members for their injuries, holding defendants liable to the extent the law allows, and preventing defendants from injuring class members in the exact same manner will not stand in the way of reaching a quick settlement to the mutual benefit of defendants and class counsel, at the expense of class counsel's putative clients. The Court should grant certiorari to resolve this circuit conflict, provide guidance to the lower courts on the use of *cy pres* awards, and correct a serious abuse of the class action mechanism that puts the interests of those it is intended to benefit, class members, dead last.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 696 F.3d 811 and reproduced at App. 1. The opinions of the United States District Court for the Northern

District of California are unpublished and reproduced at App. 48 and App. 63.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 2012. A timely petition for rehearing *en banc* was denied on February 26, 2013. App. 75. Justice Kennedy extended the time in which to file a petition for certiorari to and including July 26, 2013. *See* No. 12A1112. This Court has jurisdiction under 28 U.S.C. § 1254(1). As a class member who objected to the settlement, Petitioner has standing to appeal the final judgment. *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

RULE INVOLVED

Federal Rule of Civil Procedure 23(e)(2) provides, with respect to a proposed settlement:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

STATEMENT OF THE CASE

A. The *Cy Pres* Doctrine in Class Action Settlements

The *cy pres* doctrine originated in the law of trusts and estates. The term is short for the French "*cy pres comme possible*," or "as near as possible." Historically, it referred to a court's power, typically under statute, to reform a trust or charitable gift that has become impossible to administer according to its terms. *See generally* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres* Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 625 (2010) [hereinafter "Redish"]. For example, a 19th-century court applied the doctrine to repurpose a trust that had been created to support the abolition movement to instead provide assistance to poor African Americans. *Jackson v. Phillips*, 96 Mass. 539 (1867).

The application of the *cy pres* doctrine, or something resembling it, to class action settlements is a more recent phenomenon. The "most adventuresome" of the 1966 amendments to Federal Rules of Civil Procedure was the addition of Rule 23(b)(3)'s provision for "class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Prods., Inc. v Windsor*, 521 U.S. 591, 614-15 (1997). That provision empowered attorneys, armed with a few representative plaintiffs, to file actions on behalf of large and diffuse classes, aggregating members' paltry claims into litigation well worth an attorney's time. When these suits prevail, whether through settlement or judgment, the proceeds typically flow into a fund out of which are made disbursements to individual class members.

It is a unique feature of opt-out class actions that, unlike in other civil litigation, funds often remain unclaimed, particularly where class members' claims are small or the claims process is burdensome. "Traditionally, such funds would revert to a defendant – often an unpopular result because reversion of the funds undermines the deterrent effect of the suit and leaves the defendant largely with the benefit of his illegal activity." Redish at 631. In the 1970s, the *cy pres* doctrine was proposed as a solution for this "problem" of unclaimed settlement funds that could achieve the "next best" result to compensation by indirectly compensating absentee class members, without undermining the deterrent effect of liability. *Id*. at 631-34.

The use of *cy pres* awards in class actions quickly moved beyond these modest origins to become an integral component of many settlements. In these cases, settlement agreements expressly provide for awards to charities or foundations in addition to, or in place of, funds earmarked for distribution to class members. Used in this fashion, *cy pres* awards facilitate the filing, certification, and settlement of class actions that would otherwise be infeasible to litigate due to unmanageability or questionable merit. Redish at 639-40; *In re Agent Orange Prod. Liab. Litig.*, 818

F.2d 179, 184-85 (2d Cir. 1987) (discussing *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1019 (2d Cir. 1973)).

As critics have documented, these types of *cy pres* awards "create the potential for conflicts of interest by ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." John Beisner, Jessica Miller & Jordan Schwartz, *Cy Pres*: A Not So Charitable Contribution to Class Action Practice 13 (2010) [hereinafter "Beisner"]. "Indeed, in many class actions it is solely the use of cy pres that assures distribution of a class settlement or award fund sufficiently large to guarantee substantial attorneys' fees and to make the entire class proceeding seemingly worthwhile." Redish at 621. Despite these concerns, the use of *cy pres* awards in class action settlements has grown quickly since the 1980s, accelerating sharply over the past decade. *Id*. at 653. The settlement at issue in the instant case is fairly representative of this trend.

B. Facebook's Beacon Program

Facebook operates the eponymous social networking website that millions of Americans (and more abroad) use to share updates on their lives with other users whom they have designated as "friends." Facebook, in turn, earns money by selling advertising tailored to its members based on the information they have disclosed to the service. Thanks to this *quid pro* *quo* – users trade personal information for access to the service – Facebook has been at the center of nearly every recent debate over technology's impact on personal privacy. If anything, the company has courted controversy through frequent changes to its privacy policies and aggressive efforts to extract more information from its members to make its service more valuable to both them and its advertisers.

To date, the most controversial of those efforts was Facebook's "Beacon" program, launched in November 2007. The idea of Beacon was to make every Facebook member a personal pitchman for approximately forty companies engaged in online commerce that had signed on to the program, including Blockbuster (movie rentals), Overstock.com (discount merchandise), and Zappos.com (shoes and apparel). Each company would send Facebook the details whenever a logged-in Facebook member made a purchase on its website. Facebook would then broadcast the details to that member's friends – after all, what could be more persuasive than a personal endorsement from a trusted friend? Facebook, of course, would collect revenue from these intimate advertisements, while its members would have yet another thing to share and discuss with their friends on the service.

But Facebook's members were less enthusiastic about Beacon than its advertisers. Almost immediately, members complained about all kinds of inadvertent and sometimes embarrassing disclosures. Beacon was indiscriminate, for example, in broadcasting news that a member had rented a blockbuster movie versus racier fare. It spoiled gifts by broadcasting not only that they had been purchased, but also whether they had been bought on sale or from a discounter. Thanks to Beacon, spouses learned of their significant others' stinginess in spending on presents and pricy self-indulgences, each of which probably caused less friction than indulgent purchases apparently intended for others, which Beacon equally revealed.

The cause of these unintended disclosures was that, to encourage uptake, Facebook had made Beacon an opt-out program and then made it exceedingly difficult for its members to opt out. Doing so "required video game skills": "The user would get a pop-up on his screen asking whether he wanted to opt out, but the pop-up would disappear in about ten seconds. Too slow reading the pop-up or clicking the mouse, and all a user's 'friends' would know exactly what he had bought." App. 27-28. Accustomed to dismissing intrusive pop-ups almost automatically, many Facebook members were unaware that their purchases would be broadcast to their Facebook friends and never knew that there was any way to opt out.

A few weeks after launching Beacon, Facebook gave in to its members' demands and made Beacon opt-in. In this version of the program, purchases on partner websites remained private unless a member authorized Facebook to publicize them. Unsurprisingly, given all the negative publicity, Beacon usage waned among members and advertisers. In September 2009, Facebook shuttered the program altogether, and Facebook's CEO later declared the entire episode a "mistake."[1]

C. The District Court Approves a Settlement That Provides No Relief to Class Members, Only a *Cy Pres* Award

In August 2008, nineteen plaintiffs filed a putative class action in the United States District Court for the Northern District of California against Facebook and its Beacon advertising partners, alleging violations of various federal and California privacy and consumer protection statutes. Notably, one of those statutes, the Video Privacy Protection Act – enacted in response to the disclosure of Judge Robert Bork's video rental records – provides liquidated damages of $2,500 for the disclosure of a consumer's video rental and sale records without his or her "informed, written consent." 18 U.S.C. § 2710 (2008). The complaint challenged only the earlier opt-out version of Beacon, which had been curtailed nearly a year before, and not the revised opt-in program.

Before the district court had a chance to rule on Facebook's motion to dismiss the plaintiffs' claims, the parties entered into settlement negotiations. In September 2009, they submitted a settlement agreement for the court's approval. That agreement provided

[1] Mark Zuckerberg, Our Commitment to the Facebook Community, The Facebook Blog (Nov. 29, 2011), https://blog.facebook.com/blog.php?post=10150378701937131.

that Facebook would pay $9.5 million to a settlement fund in exchange for a release of class members' claims. At the same time, it dramatically expanded the class to include Facebook members who might have claims relating to the opt-out version of Beacon, and provided for certification of this expanded class. Facebook and its advertisers would thereby be immunized against all future claims regarding Beacon.

Other than "incentive payments" of a few thousand apiece to the named plaintiffs, class members would receive no compensation at all. Instead, approximately $6.5 million of the settlement fund would be used to establish a new grant-making organization called the Digital Trust Foundation ("DTF"), with a mission to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." App. 6. This foundation would be run by a three-member board of directors selected by Facebook and class counsel. The initial board consisted of Facebook's chief lobbyist, a journalist who already served on Facebook's "Safety Advisory Board," and a law professor.

Class counsel and Facebook agreed that attorney fees would be drawn out of the settlement fund. Facebook also agreed not to oppose an attorneys' fee claim of up to $3,166,667, or one-third of the fund. App. 32. Ultimately, the district court awarded

$2,364,973 in fees and expenses, twice the alleged lodestar. App. 67.

The settlement also provided that Facebook would end the moribund "Beacon" program, which Facebook did months before the district court acted on the proposed settlement. But, as class counsel explained to the district court, Facebook refused to sign off on any agreement "limiting their future actions as a corporation," and it would agree only to terminate "the program launched by Facebook on November 6, 2007 and all iterations thereof bearing the 'Beacon' name." App. 31-32. Facebook therefore "remained free to do what it had done before, under a different name." App. 32.

The district court certified the class and approved the settlement over the Petitioner's objection that it was not "fair, reasonable, and adequate," as required by Rule 23(e)(2), because it awarded class members nothing while providing millions in dubious *cy pres* "relief" and millions in attorneys' fees. The court agreed with class counsel that "the immediate benefits represented by the Settlement outweighed the possibility – perhaps remote – of obtaining a better result at trial." App. 58. As for the availability of liquidated damages for violation of the Video Privacy Protection Act and other statutes, the court said only that those claims "implicate factual issues that would likely be vigorously disputed" and that the court was not aware of "any cases in which plaintiffs have been awarded multiple liquidated damages." App. 55. On that basis, the court concluded that the proposed *cy* *pres* award, establishment of the DTF, "provides more meaningful relief to the Class" than would litigation seeking statutory damages. App. 59.

The court also rejected objections that the settlement created a new organization, in a field that is far from underserved, and placed its control in the hands of the defendant and class counsel. The objectors, it said, had failed to make a "persuasive showing that the Foundation will be a mere publicity tool for Facebook, or in any meaningful sense under Facebook's direct control." App. 61. Regardless, such arguments, it said, are "beyond the purview of the Court" because parties are free to structure their own settlements. App. 61.

D. A Split Panel of the Ninth Circuit Affirms

In affirming approval of the settlement, the Ninth Circuit essentially adopted the district court's reasoning. To begin with, it denied that the *cy pres* doctrine requires "settling parties [to] select a cy pres recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process." App. 14. Instead, it explained, the district should approve a class action settlement containing a *cy pres* award if "it bears a substantial nexus to the interests of the class members." App. 14.

Here, it held, that requirement was satisfied because the "distribution of settlement funds to entities that promote the causes of online privacy and security will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit." App. 15.

The panel majority rejected each of the objectors' challenges to the adequacy of the settlement. First, even while recognizing that some class members may "have successful claims for $2,500 in statutory damages under the VPPA," it reasoned that not all class members had such claims and that the total settlement amount, $9.5 million, "was substantial in this case" and therefore adequate "to the class *as a whole*." App. 21 (emphasis in original). In any case, it held, paying out to class members the $6.5 million that remained after fees and costs would be " 'burdensome' and inefficient" because "each class member's recovery under a direct distribution would be *de minimis*." App. 23. It did not address that these factors – the size of the fund, the number of class members, the absence of subclasses – were components of the settlement itself.

Second, the panel majority saw no problem that the recipient of settlement funds would be controlled, in part, by the defendant. It was only understandable, the court explained, that Facebook "insisted on preserving its role in the process of selecting the organizations that would receive a share of that substantial settlement fund. . . . so as to ensure that the funds will not be used in a way that harms Facebook." App. 16. For the district court to question this aspect of the *cy pres* award would have been to "undermine" the parties' negotiations and impermissible "second-guessing [of] the parties' decision." App. 16.

Third, the panel majority was also untroubled by the settlement's creation of a new organization with no record of service that would at least suggest likely benefit to absentee class members. It was enough, the court said, that DTF has a mission statement, which "tell[s] us exactly how funds will be used." App. 17. That mission, in turn, "bears a direct and substantial nexus to the interests of absent class members." App. 15. The court dismissed concerns that the organization might not carry out its stated mission as "unsupported speculation." App. 17 n.4.

Finally, the panel majority rejected the objection that the settlement's provision for Beacon's termination provided no benefit to class members as moot because it was enough that "the $9.5 [*sic*] settlement award substantially furthers the interests of the class." App. 24.

Having bulldozed every objection, the panel majority affirmed the district court's holding that a settlement that provided no direct relief to class members, only a questionable *cy pres* award, was "fundamentally fair." App. 25.

Judge Kleinfeld dissented, arguing that the "settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class." App. 27. The class action procedure, he explained, "has obvious attendant risks, because class counsel's 'clients' are not clients at all in the traditional sense; they do not hire the lawyer, they do not agree on a fee with him, and they do not control whether he settles their case. They are in no position to prevent class counsel from pursuing his own interests at their expense." App. 34.

Cy pres awards only accentuate these risks because they can facilitate the "pursuit of self-interest rather than the class's interests." App. 44. In particular:

> A defendant may prefer a cy pres award to a damages award, for the public relations benefit. And the larger the cy pres award, the easier it is to justify a larger attorneys' fees award. The incentive for collusion may be even greater where, as here, there is nothing to stop Facebook and class counsel from managing the charity to serve their interests and pay salaries and consulting fees to persons they choose.

App. 45.

To prevent that result, Judge Kleinfeld explained, "the district court must ensure that a cy pres award targets the plaintiff class." App. 45. Here, however, the district court failed to do so. There was no "established record of performance by the charity of acts beneficial to people in the wronged class." App. 46. Indeed, "an 'educational program' amounting to an advertising campaign for Facebook" would appear to satisfy DTF's court-approved mission statement. App. 46.

The only apparent benefit of the *cy pres* award in this case, Judge Kleinfeld concluded, was to aid Facebook and class counsel in facilitating a collusive settlement between the lead defendant and class counsel. As for any benefit to class members, the most that could be said "is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met." App. 47.

The court subsequently denied panel rehearing, over Judge Kleinfeld's dissent, and denied rehearing *en banc*, over the dissent of Judge Milan Smith, joined by Chief Judge Kozinski, and Judges O'Scannlain, Bybee, Bea, and Ikuta. App. 75. Judge Smith protested that the *cy pres* award here failed to "(1) be reasonably certain to benefit the class, and (2) advance the objectives of the statutes relied upon in bringing suit." App. 76. Instead, under the panel opinion's approach, "an open-ended, one-sentence mission statement is all it takes to earn cy pres settlement approval." App. 78. Worse still, that mission bore little relationship to the wrongs alleged by the plaintiffs, because no amount of education on privacy protection though "user control" could "teach users how to protect themselves from Facebook's deliberate misconduct" in wrongfully disclosing personal information they had already shared with Facebook. App. 80.

As a result, Judge Smith concluded, "this case creates a significant loophole in our case law that will confuse litigants and judges, while endorsing cy pres settlements that in no way benefit class members." App. 76.

REASONS FOR GRANTING THE PETITION

This petition presents an ideal and timely opportunity for the Court to resolve a circuit split over the use of *cy pres* awards in class action settlements and provide much-needed guidance to the lower courts on a recurring issue of substantial importance.

I. The Ninth Circuit's Decision Squarely Conflicts with the Decisions of Other Circuits Limiting the Use of *Cy Pres* Awards

The Ninth Circuit's decision conflicts with numerous decisions of the other circuits on the fundamental question of when it is "fair, reasonable, and adequate" for a class action settlement to award money not to class members but to third parties unconnected to the litigation. This Court's intervention is warranted to establish a nationwide standard for the use of *cy pres* awards in class action settlements and thereby prevent counsel bringing nationwide class actions from shopping for forums that provide their putative clients the weakest protections against collusive settlements facilitated by *cy pres* awards.

A. The most fundamental conflict created by the Ninth Circuit's decision concerns whether a *cy pres* distribution is appropriate and should be treated as equivalent to direct monetary recovery in determining the fairness of a settlement, especially when the defendant indirectly benefits from the *cy pres* award. On this point, the Ninth Circuit is now in conflict with decisions of the Second, Third, Fifth, and Seventh Circuits.

1. The Third Circuit has emphasized that the critical factor in evaluating a proposed settlement containing a *cy pres* award is "whether the settlement provides sufficient direct benefit to the class," *i.e.*, money compensation. *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176 (3d Cir. 2013). Thus, the district court must consider things like "the number of individual awards compared to both the number of claims and the estimated number of class members, the size of the individual awards compared to claimants' estimated damages, and the claims process used to determine individual awards" before it may approve such a settlement. *Id*. at 174. The district court has an obligation to "affirmatively seek out such information." *Id*. And having made such findings, the district court must then determine whether the "compensation going directly to class members" is sufficient. *Id*. at 176.

Cy pres awards, it explained, are no substitute for direct compensation:

> The private causes of action aggregated in this class action – as in many others – were created by Congress to allow plaintiffs to recover compensatory damages for their injuries. *Cy pres* distributions imperfectly serve that purpose by substituting for that direct compensation an indirect benefit that is at best attenuated and at worse illusory. *Cy pres* distributions also present a potential conflict of interest between class counsel and their clients because the inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class. Where a court fears counsel is conflicted, it should subject the settlement to increased scrutiny.

Id. at 173 (citations and footnote omitted).

Applying such scrutiny, the court vacated a class action settlement that awarded only $3 million of a $35 million settlement to a class of consumers who alleged that they had paid inflated prices for baby products due to unlawful collusion, with the remainder going to charity as a *cy pres* award. This distribution was due, in large part, to the structure of the settlement, which required class members seeking more than a $5 award to submit extensive documentation. As a result, even class members who had suffered overcharges of $50 or more, and would be entitled by the Clayton Act to treble damages, had no real incentive to file claims. *Id*. at 176. "Class members are not indifferent to whether funds are distributed to them or to *cy pres* recipients, and class counsel should not be either." *Id.* at 178. Accordingly, the court remanded the case for the district court to "determine whether the class received sufficient direct benefit to justify the settlement as fair, reasonable, and adequate." *Id.* at 176. *Accord In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 354-55 (3d Cir. 2010) (vacating and remanding approval of a class action settlement involving a *cy pres* award of excess funds because the district court had no factual basis to determine whether a cap on individual awards to class members was reasonable based on class members' likely recovery in litigation).[2]

By contrast, the settlement approval affirmed by the Ninth Circuit makes no attempt to estimate the value of class members' claims before approving a *cy pres* award that entirely depletes the settlement fund. Instead, it simply accepts class counsel's conclusion that the settlement outweighs any possibility of recovery through actual litigation, App. 58, and assumes that class members would be entitled to only "de minimis amounts," App. 59, despite the availability

[2] *See also Pet Food Prods.*, 629 F.3d at 363 n.4 (Weis, J., concurring and dissenting) (citing the American Law Institute's Principles of the Law of Aggregate Litigation § 3.07 (2010) ("ALI Principles") for the recommendation that "courts make numerous inquiries as to the viability of additional payments to the class before consideration of the cy pres remedy").

of statutory liquidated damages for some class members that are far more than *de minimis*. In this way, the Ninth Circuit's decision conflicts with the Third Circuit's requirement that district courts scrutinize whether a settlement provides adequate direct compensation to class members before authorizing a *cy pres* award of excess funds.

2. Similar to the Third Circuit, the Seventh Circuit has held that a settlement that denies all direct relief to class members, in favor of a *cy pres* remedy, can be justified only if "careful scrutiny indicated that the class had no realistic prospect of sufficient success to enable an actual distribution to the class members." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785-86 (7th Cir. 2004). "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Id.* at 785 (citations omitted).

On that basis, the court reversed approval of a settlement that relied on the doctrine of *cy pres* to deny direct compensation to a subclass of mortgage-holders whose bank had transmitted their financial information to telemarketing companies selling dubious financial services. Class counsel and defendants maintained that the settlement amount was too little, and the subclass too large, for distributions to its members. Its members, they argued, received a *cy* *pres* benefit from additional distributions to members of a smaller subclass of mortgage-holders who had actually purchased financial services from the telemarketers, because that remedy promoted deterrence and carried out the purpose of the consumer-protection statutes underlying their claims.

The court met that argument with incredulity:

> Would it be too cynical to speculate that what may be going on here is that class counsel wanted a settlement that would give them a generous fee and Fleet wanted a settlement that would extinguish 1.4 million claims against it at no cost to itself? The settlement that the district judge approved sold these 1.4 million claimants down the river. Only if they had no claim – more precisely no claim large enough to justify a distribution to them – did they lose nothing by the settlement, and the judge made no finding that they had no such claim.

Id.

The court of appeals reversed the district court's approval of the settlement and remanded with instructions for it to estimate the value of the subclass's claims and reconsider the settlement's fairness to class members. *Accord Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 749 (7th Cir. 2006) (rejecting, on identical grounds, a revised settlement that also denied the subclass any direct relief, while awarding funds to various charities).

The settlement approval affirmed by the Ninth Circuit certainly never found that class members "had no claim," even as it endorsed a settlement that sold them down the river by extinguishing their claims without any direct compensation, only a *cy pres* award to a third party. To the contrary, both the district court and the Ninth Circuit recognized that at least some class members had potentially valuable claims for statutory liquidated damages. App. 59, 21. For that reason, the Ninth Circuit's decision conflicts with the Seventh Circuit's in *Mirfasihi.*

3. Reasoning that "settlement-fund proceeds, having been generated by the value of the class members' claims, belong solely to the class members," the Fifth Circuit has held that a *cy pres* award is permissible "only if it is not possible" to compensate class members directly. *Klier v. Elf Autochem N. Am., Inc.*, 658 F.3d 468, 474-75 & nn.15, 16 (5th Cir. 2011). It therefore rejected a *cy pres* award of excess funds that had been allocated to one subclass, where members of another subclass had not been fully compensated for their injuries caused by exposure to arsenic and other toxins. *Id*. at 478-79. *Cy pres* awards, it said, are not permitted outside of the narrow circumstance where "it is not possible to put those funds to their very best use: benefitting the class members directly." *Id*. at 475. Chief Judge Edith Jones concurred, arguing that *cy pres* awards should be strongly disfavored due to the inevitable conflicts of interest and abuses associated with application of the doctrine to class action settlements. *Id*. at 480-81.

The Second Circuit has held essentially the same as the Fifth, directing a district court to ensure that class members "have been compensated for their actual losses" before considering a *cy pres* award. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007). *See also In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 35 (1st Cir. 2009) (endorsing a district court's insistence that a "settlement pay class members treble damages [as provided by the underlying statute] before any money is distributed through cy pres").

The opinion below conflicts with *Klier* and *Masters* because it authorizes *cy pres* relief where providing additional direct compensation to at least some class members was possible. In that respect, *Klier* and *Masters* are also in conflict with the Third Circuit's decision in *Baby Products*. 708 F.3d at 173-74.

B. The Ninth Circuit's decision also creates a circuit split regarding the required nexus between a *cy pres* award and class members' interests. On this point, the Ninth Circuit is now in conflict with the Second, Seventh, and Eighth Circuits.

The American Law Institute recommends that *cy pres* awards, when otherwise appropriate, go to "recipient[s] whose interests reasonably approximate those being pursued by the class" and lists that as an absolute requirement for settlements that deny class members any direct compensation. ALI Principles § 3.07. In general, the courts of appeals have adopted this as a baseline requirement for approval of *cy pres* awards. *See In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 33-34 (1st Cir. 2012) (citing ALI Principles and listing cases).

Applying that rule, the Eighth Circuit invalidated a *cy pres* award to the National Association for Public Interest Law from excess funds remaining after the settlement of antitrust claims against the major airlines because the award was not tailored "to the nature of the underlying lawsuit." *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 683 (8th Cir. 2002). The evidence and the district court's findings had shown that the airlines colluded to cap commissions available to travel agents in Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands, but only agents in Alaska and Hawaii had been compensated. *Id*. Accordingly, "travel agencies in Puerto Rico and the U.S. Virgin Islands were clearly the next best recipients of the funds" that remained after the class of Alaskan and Hawaiian agents had been fully compensated, not a generic 'public interest' organization. *Id*.

Applying similar logic, the Seventh Circuit invalidated a settlement agreement, in a nationwide antitrust class action, featuring a *cy pres* distribution to local law schools and directed the district court to "consider to some degree a broader nationwide use of its *cy pres* discretion." *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989). Previously, the same court had disapproved of an earlier *cy pres* award in the case that would have established a private antitrust research foundation because "[t]here has already been voluminous research" on the subject and so additional funding would not achieve the class's interests. *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1253-54 (7th Cir. 1984).

The Second Circuit has adopted an even stricter standard than the Seventh and Eighth, requiring that a *cy pres* award actually advance class members' interests. *Eisen*, 479 F.2d 1005, *vacated and remanded on other grounds*, 417 U.S. 156 (1974). Applying that standard in a later case, it approved the establishment of a "class assistance foundation . . . to fund projects and services that will benefit the entire class," consisting of persons who had been exposed to Agent Orange. *Agent Orange*, 818 F.2d at 184-85 (quotation marks omitted) (discussing *Eisen*). Key was that the foundation's benefits would flow to "the class that claims injury from Agent Orange," not third parties. *Id*. at 185.

As described in Judge Smith's dissent from denial of rehearing *en banc*, the *cy pres* award in this case does not at all "approximate" class members' interests. *See* App. 77-78. The class complained that Facebook and its advertising partners wrongfully exposed members' private information "in ways that even educated users cannot anticipate, prevent, or direct," in violation of numerous statutory requirements. App. 79. By contrast, the *cy pres* recipient proposes to fund public education on protecting Internet privacy through "user control," App. 6, which is the very thing that Facebook and its partners denied to class members, causing their injuries.

While education on "user control" may further Facebook's interests – certainly more so than research and public awareness campaigns critical of privacy abuses by service providers like Facebook – it does absolutely nothing to advance anything like class members' interests, and it certainly does not benefit them. For that reason, the Ninth Circuit's decision is in conflict with ALI's 'approximate interest' standard, conflicts with decisions of the Seventh and Eighth Circuits applying that standard, and falls far short of the Second Circuit's more rigorous 'actual benefit' standard.

C. Finally, the Ninth Circuit's decision also splits with the Second Circuit's decision in *Agent Orange* and First Circuit's decision in *Lupron* regarding the duty of the district court to supervise the administration of an open-ended *cy pres* award to ensure that it achieves its intended purpose. Although approving of the idea of a grant-making "class assistance program," the Second Circuit held that the "district court must . . . designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds." 818 F.2d at 185. The power to pick and choose remedies paid for with class members' money, it explained, belongs to the district court alone, and "there is no principle of law authorizing such a broad delegation of judicial authority to private parties." *Id*. And there could be "no assurance that [a] self-governing and self-perpetuating board of directors . . . will possess the independent, disinterested judgment required to allocate limited funds to benefit the class as a whole." *Id*. (quotation marks omitted). Instead, "only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes." *Id*. at 186. *Accord Lupron*, 677 F.3d at 38-39 (modifying *cy pres* order to include annual audit requirement). *But see Baby Prods.*, 708 F.3d at 181 (endorsing *cy pres* distribution to third parties to be named later without new notice to the class and suggesting that class members might intervene later to challenge improper distributions).

By contrast, the settlement upheld by the Ninth Circuit vests all control over the disbursement of class members' funds in a three-member board of directors controlled by the defendant and class counsel. There is absolutely no reason to believe that this board, which includes Facebook's chief lobbyist, will exercise "independent, disinterested judgment" or that it will allocate funds "to benefit the class as a whole" – indeed, its mission is unrelated to any class members' benefit. *See* App. 41-42.

Moreover, by permitting a *cy pres* award to a Facebook-affiliated foundation, the Ninth Circuit rejects the ALI Principles' requirement that *cy pres* recipients have no "significant prior affiliation with the intended recipient that would raise substantial questions about whether the award was made on the merits." ALI Principles § 3.07 cmt. (b); *cf. Lupron*, 677 F.3d at 36-37.

II. The Question Presented Is Important and Frequently Recurring

Having long recognized that Rule 23(b)(3) opt-out class actions are an "adventuresome" innovation fraught with potential conflicts, *e.g.*, *Amchem*, 521 U.S. at 614, 625-26, in recent terms the Court has policed abuses of this procedural mechanism to skirt the limitations of substantive law, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), and to undermine class members' rights, *e.g.*, *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013). The availability of *cy pres* relief only accentuates these pathologies of the class-action procedure by facilitating settlements that provide substantial benefits to defendants and class counsel, often at the expense of class members. Not only does this case present the Court with an opportunity to resolve a circuit split with nationwide implications, it would also further the Court's efforts to ensure that the lower courts appropriately enforce the requirements of Rule 23.

A. The unfettered use of *cy pres* awards has been subject to substantial criticism by courts and scholars alike. They have identified at least five specific concerns regarding the type of *cy pres* award upheld in this case.

1. As in this case, *cy pres* awards typically fail to redress class members' alleged injuries. Judge Richard Posner stated the problem plainly: "There is no indirect benefit to the class from the defendant's

giving the money to someone else." *Mirfasihi*, 356 F.3d at 784. Yet settlements that do just that are disturbingly routine. For example, in exchange for their claims that major music labels engaged in unlawful price-fixing, class members received coupons for discounts on further CD purchases, while all settlement funds went to pay attorneys' fees and to make a *cy pres* award to the National Guild of Community Schools of the Arts to develop an arts-related website. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. 2:00MD1361-PH, 2005 WL 1923446, at *3 (D. Me. Aug. 9, 2005). According to the district court, this award actually benefitted class members by promoting the "development of future musical artists." *Id.*

Even worse was a settlement resolving challenges to Google's unauthorized disclosure of its users' email contacts when it launched its "Buzz" social network. Class members – some of whom had suffered disclosures that aided stalkers, jeopardized confidential journalist sources, or hinted at affairs – received no part of the $8.5 million settlement, while class counsel received over $2 million and the remainder was divided among fourteen charities, including the local YMCA and the Brookings Institution – and, by the *sua sponte* order of the district court, a center at a university where the district court judge taught as a visiting professor at its law school.[3]

[3] While not present in this case, the problem of *cy pres* being designated for local charities at the expense of a national

(Continued on following page)

In re Google Buzz Privacy Litig., No. C 10-00672 JW, 2011 WL 7460099, at *3 (N.D. Cal. June 2, 2011); Pamela A. MacLean, Competing for Leftovers, California Lawyer 15 (Sept. 2011). *See also In re Netflix Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801 (N.D. Cal. Mar. 18, 2013) (relying on the Ninth Circuit's opinion in the instant case to justify a $9 million settlement that denied class members any monetary compensation, instead directing funds to various charitable organizations); *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 414-15 (S.D.N.Y. 2009) (collecting numerous cases where *cy pres* awards in class action settlements "stray[ed] far from the 'next best use'").

If "funds generated through the aggregate prosecution of divisible claims are presumptively the property of the class members," ALI Principles § 3.07 cmt. (b) – something that would unquestionably be the case had class members pursued individual litigation under the same substantive law – it is at

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class is also persistent. *Compare Houck*, 881 F.2d at 502 (rejecting *cy pres* designated for local law schools and remanding for "broader nationwide use"), *with*, *e.g.*, *Perkins*, *infra*, *and In re Easysaver Rewards Litig.*, ___ F. Supp. 2d ___, No. 09-cv-2094 AJB (WVG), 2013 WL 435032 (S.D. Cal. Feb. 4, 2013) ($3 million to local San Diego schools including *alma mater* of counsel for both parties); *see generally* Sam Yospe, Note, Cy Pres Distributions in Class Action Settlements, 2009 Colum. Bus. L. Rev. 1014, 1030-31; Examination of Litigation Abuse: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 113th Cong. (Mar. 13, 2013) (written testimony of Theodore H. Frank).

the least troubling that some lower courts claim the discretion to distribute that property to third parties before class members have been compensated and, more generally, to approve settlements structured so as to stymie or preclude class members' recovery.

2. *Cy pres* awards drive a wedge between the interests of class members and their putative counsel. The chief problem is that, when attorneys settle a class action, they are negotiating both their own fees and class recovery. But *cy pres* awards divorce attorneys' fees (typically based on the total value of the settlement) from their clients' recovery, "ensuring that class attorneys are able to reap exorbitant fees regardless of whether the absent class members are adequately compensated." Beisner at 13. Thus, class counsel are financially indifferent as to whether a settlement is structured to compensate their clients or direct settlement proceeds to third parties. In some cases, class counsel may actually prefer a *cy pres* award that advances their own interests, such as by funding the development of future litigation, making a sizable donation to counsel's *alma mater*, or even both. *See, e.g.*, Ashley Roberts, Law School Gets $5.1 Million to Fund New Center, GW Hatchet, Dec. 3, 2007 (describing $5.1 million *cy pres* award to George Washington University School of Law to create a "Center for Competition Law").

Arguably, "[b]y disincentivizing class attorneys from vigorously pursuing individualized compensation for absent class members, cy pres threatens the due process rights of those class members." Redish at

650 (citing *Hansberry v. Lee*, 311 U.S. 32, 45-46 (1940), and Fed. R. Civ. P. 23(a)(4) (requiring adequacy of representation)).

3. Defendants, facing no resistance from class counsel, use *cy pres* awards to structure settlements to minimize costs or even benefit themselves. Such awards create the illusion of relief that can "increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefitting the plaintiff." Redish at 661. Google and Facebook, for example, have directed *cy pres* awards in privacy-breach cases to the Electronic Frontier Foundation, a nonprofit that "is often an ally of Google and Facebook when it comes to staving off liability to rights holders over user-generated infringing content" and on other public policy issues. Roger Parloff, Google and Facebook's New Tactic in the Tech Wars, CNNMoney, July 30, 2012; *see also* MacLean, *supra,* at 15 (noting that *Google Buzz* settlement distributed *cy pres* to six charities Google had given money to in previous year). At the same time, those companies have apparently vetoed awards to privacy-focused nonprofits that they view as "too aggressively devoted to combatting the wrongs that allegedly harmed the class." Parloff, *supra*.

Even if Google and Facebook ultimately receive no direct benefit from these awards, they still are able to take credit for their charity. *See Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003) (observing that "it seems somewhat distasteful to allow a corporation to fulfill its legal and equitable obligations through tax-deductible donations to third parties"); *Dennis v. Kellogg Co.*, 697 F.3d 858, 867-68 (9th Cir. 2012) (noting that *cy pres* awards that overlap with charitable gifts to which the defendant has already committed are a "paper tiger," in terms of deterrence).

In the instant case, Facebook stands to benefit by funding a public education campaign that emphasizes users' ability to block disclosure of personal information, while commensurately minimizing the perceived risk of disclosure due to the actions of services like Facebook. And that is a best-case scenario; as Judge Kleinfeld explained, "For all we know [the DTF] will fund nothing but an 'educational program' amounting to an advertising campaign for Facebook." App. 46. Nothing in the settlement forbids it.

4. The Second Circuit has expressed concern that the availability of *cy pres* relief "would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not." *Agent Orange*, 818 F.2d at 185. This, in turn, "would have induced plaintiffs to pursue 'doubtful' class claims for 'astronomical amounts' and thereby 'generate . . . leverage and pressure on defendants to settle.'" *Id*. (alteration in original) (quoting *Eisen*, 479 F.2d at 1019). In this way, *cy pres* incentivizes both the bringing of 'strike suits' and their settlement on terms mutually agreeable to class counsel and the defendant. *Cf. Amchem*, 521 U.S. at 620 (stating that the Rule 23 prerequisites "demand undiluted, even heightened, attention in the settlement context.").

5. Finally, *cy pres* awards often create the appearance or reality of judicial conflicts of interest. New York University's Samuel Issacharoff, Reporter for ALI's Principles of the Law of Aggregate Litigation, has described *cy pres* relief as "an invitation to wild corruption of the judicial process." Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007. As the *New York Times* has documented, charities are increasingly lobbying judges for a cut of the proceeds in class action settlements. *Id*. And "[a]s part of their effort to secure judicial approval of proposed settlements, the parties often include a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated." Beisner at 13.

While greasing the wheels of justice, these tactics create a substantial conflict between the interests of the presiding judge and those of class members, who may be better served by direct compensation or some other mode of relief. *See Klier*, 658 F.3d at 482 (Jones, C.J., concurring) ("[D]istrict courts should avoid the legal complications that assuredly arise when judges award surplus settlement funds to charities and civic organizations."); *Bear, Stearns*, 626 F. Supp. 2d at 415 ("[W]hile courts and the parties may act with the best intentions, the specter of judges and outside entities dealing in the distribution and solicitation of large sums of money creates an appearance of impropriety."). *Compare Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011) (criticizing *cy pres* distributions to *alma mater*), *with Perkins v. Am. Nat'l Ins. Co.*, No. 3:05-CV-100 (CDL), 2012 WL 2839788 (M.D. Ga. July

10, 2012) (approving $1.5 million *cy pres* award to the presiding judge's *alma mater*). Indeed, it is even conceivable that "parties can effectively judge-shop by selecting *cy pres* recipients that would force recusal." Ted Frank, Fraley v. Facebook update, Point of Law (July 12, 2012) (noting district judge recusal for unspecified reasons after parties proposed *cy pres* settlement that named charitable beneficiaries affiliated with judge and her husband).

A more fundamental problem is that an open-ended *cy pres* doctrine is incompatible with the judicial role. "Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set." *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006). Yet those things are exactly what federal judges are asked to do with increasing frequency.

B. Given the convenience of *cy pres* awards to defendants and class counsel, it should not be surprising that their use in class action settlements is growing at a rapid clip. A recent paper surveying *cy pres* awards in federal court cases from 1974 through 2008 reports the following findings:

> First, the prevalence of class action cy pres awards has increased steadily by decade since the 1980s and has accelerated noticeably after 2000. Second, since 2000, the majority of class action cy pres awards are associated with cases that were certified solely for the purposes of settlement, over one-third of class action cy pres awards are associated with faux class actions, and approximately two-thirds of class action cy pres awards are associated with either settlement or faux class actions. Third, in a quarter of cy pres class actions, the amount and recipient of the cy pres award was determined *ex ante*, or prior to giving absent class members the opportunity to make claims on the fund. Fourth, the average cy pres award was $5.8 million and accounted on average for 30.8% of total compensatory damages. Finally, not only do cy pres awards have the potential to increase the total available fund and legitimize cases where the class might not otherwise be certified, but they can also increase the likelihood and absolute amount of attorneys' fees awarded without directly, or even indirectly, benefiting the plaintiff.

Redish at 661.

The question presented by this petition is therefore both important and frequently recurring.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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JULY 2013

TABLE OF APPENDICES

United States Court of Appeals
FOR THE NINTH CIRCUIT

Argued October 12, 2011

Decided September 20, 2012

No. 10-16380, No. 10-16398

SEAN LANE; MOHANNAED SHEIKHA; SEAN MARTIN; ALI SAMMOUR; MOHAMMAED ZIDAN; SARA KARROW; COLBY HENSON; DENTON HUNKER; FIRAS SHEIKHA; HASSEN SHEIKHA; LINDA STEWART; TINA TRAN; MATTHEW SMITH; ERICA PARNELL; JOHN CONWAY; PHILLIP HUERTA; ALICIA HUNKER; MEGAN LYNN HANCOCK, a minor, by and through her parent Rebecca Holey; AUSTIN MUHS; CATHERINE HARRIS; MARIO HERRERA; MARYAM HOSSEINY, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. FACEBOOK, INC., a Delaware corporation; BLOCKBUSTER, INC., a Delaware corporation; FANDANGO, INC., a Delaware corporation; HOTWIRE, INC., a Delaware corporation; STA TRAVEL, INC., a Delaware corporation; OVERSTOCK.COM, INC., a Delaware corporation; ZAPPOS.COM, INC., a Delaware corporation; GAMEFLY, INC., a Delaware corporation, Defendants-Appellees, GINGER MCCALL, Class Member, Objector-Appellant. SEAN LANE; MOHANNAED SHEIKHA; SEAN MARTIN, individually, and on behalf of themselves and all others similarly situated; ALI SAMMOUR; MOHAMMAED ZIDAN; SARA KARROW; COLBY

HENSON; DENTON HUNKER; FIRAS SHEIKHA; HASSEN SHEIKHA; LINDA STEWART; TINA TRAN; MATTHEW SMITH; ERICA PARNELL; JOHN CONWAY; PHILLIP HUERTA; ALICIA HUNKER; MEGAN LYNN HANCOCK, a minor, by and through her parent Rebecca Holey; AUSTIN MUHS; CATHERINE HARRIS; MARIO HERRERA; MARYAM HOSSEINY, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. FACEBOOK, INC., a Delaware corporation; BLOCKBUSTER, INC., a Delaware corporation; HOTWIRE, INC., a Delaware corporation; FANDANGO, INC., a Delaware corporation; STA TRAVEL, INC., a Delaware corporation; OVERSTOCK.COM, INC., a Delaware corporation; ZAPPOS.COM, INC., a Delaware corporation; GAMEFLY, INC., a Delaware corporation, Defendants-Appellees, MEGAN MAREK; BENJAMIN TROTTER, Class Members, Objectors-Appellants.

Michael H. Page, Public Citizen Litigation Group, Washington, D.C.; Steven F. Helfand, Helfand Law Offices, San Francisco, California, for the objectors-appellants.

Scott A. Kamber, Kamber Law, LLC, New York, New York, for the plaintiffs-appellees.

Michael G. Rhodes, Cooley LLP, San Francisco, California, for the defendants-appellees.

Before: Procter Hug, Jr., Andrew J. Kleinfeld, and William A. Fletcher, Circuit Judges. Opinion by Judge Hug; Dissent by Judge Kleinfeld.

OPINION

HUG, Circuit Judge:

The question presented is whether the district court abused its discretion in approving the parties' $9.5 million settlement agreement as "fair, reasonable, and adequate," either because a Facebook employee sits on the board of the organization distributing cy pres funds or because the settlement amount was too low. We hold that it did not.

I

Facebook is an online social network where members develop personalized web profiles to interact and share information with other members. The type of information members share varies considerably, and it can include news headlines, photographs, videos, personal stories, and activity updates. Members generally publish information they want to share to their personal profile, and the information is thereby broadcasted to the members' online "friends" (i.e., other members in their online network).

In November of 2007, Facebook launched a new program called "Beacon." Facebook described the purpose of the Beacon program as allowing its members to share with friends information about what they do elsewhere on the Internet. The program operated by updating a member's personal profile to reflect certain actions the member had taken on websites belonging to companies that had contracted with Facebook to participate in the Beacon program. Thus, for example, if a member rented a movie through the participating website Blockbuster.com, Blockbuster would transmit information about the rental to Facebook, and Facebook in turn would broadcast that information to everyone in the member's online network by publishing to his or her personal profile.

Although Facebook initially designed the Beacon program to give members opportunities to prevent the broadcast of any private information, it never required members' affirmative consent. As a result, many members complained that Beacon was causing publication of otherwise private information about their outside web activities to their personal profiles without their knowledge or approval. Facebook responded to these complaints (and accompanying negative media coverage) first by releasing a privacy control intended to allow its members to opt out of the Beacon program fully, and then ultimately by discontinuing operation of the program altogether.

Unsatisfied with these responses, a group of nineteen plaintiffs filed a putative class action in federal district court against Facebook and a number of other entities that operated websites participating in the Beacon program. The class-action complaint alleged that the defendants had violated various state and federal privacy statutes.[1] Each of the

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[1] Specifically, the plaintiffs alleged violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 (1986); the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986); the

plaintiffs' claims centered on the general allegation that Beacon participants had violated Facebook members' privacy rights by gathering and publicly disseminating information about their online activities without permission. The plaintiffs sought damages and a variety of equitable remedies for the alleged privacy violations.

Facebook denied liability and filed a motion to dismiss the plaintiffs' claims. Before the district court ruled on Facebook's motion, the parties elected to attempt settling their case through private mediation. The parties' initial settlement talks reached an impasse over whether Facebook should terminate the Beacon program permanently, but after two mediation sessions and several months of negotiations, Facebook and the plaintiffs arrived at a settlement agreement. In September of 2009, plaintiff Sean Lane submitted the parties' finalized settlement agreement to the district court for preliminary approval.

The terms of the settlement agreement provided that Facebook would permanently terminate the Beacon program and pay a total of $9.5 million in exchange for a release of all the plaintiffs' class claims. Of the $9.5 million pay-out, approximately $3 million would be used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives. Facebook would use the remaining $6.5 million or so

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Video Privacy Protection Act, 18 U.S.C. § 2710 (1988); California's Consumer Legal Remedies Act, Cal. Civ. Code § 1750; and California's Computer Crime Law, Cal. Pen. Code § 502.

in settlement funds to set up a new charity organization called the Digital Trust Foundation ("DTF"). The stated purpose of DTF would be to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." The parties' respective counsel arrived at the decision to distribute settlement funds through a new grant-making organization, rather than simply give the funds to an existing organization, at the suggestion of the private mediator overseeing their negotiations. Neither Facebook's nor the plaintiffs' class counsel was comfortable with selecting in advance any particular non-profit or non-profits to receive the entirety of the settlement fund, so they acceded to the mediator's suggestion that Facebook set up a new entity whose sole purpose was to designate fund recipients consistent with DTF's mission to promote the interests of online privacy and security.

According to DTF's Articles of Incorporation, DTF would be run by a three-member board of directors. The initial three directors were Larry Magrid, a member of the federal government's Online Safety and Technology Working Group and several other online safety organizations; Chris Hoofnagle, director of the Information Privacy Programs at the Berkeley Center for Law and Technology and former director for an office of the Electronic Privacy Information Center; and most relevant here, Timothy Sparapani, Facebook's Director of Public Policy and former counsel for the American Civil

Liberties Union. The Articles of Incorporation further provided that all of DTF's funding decisions had to be supported by at least two members of the three-member board of directors but that the plan for succession of directors required unanimous approval. Finally, the Articles of Incorporation provided that DTF would be strictly a grant-making organization and could not engage in lobbying or litigation.

The settlement agreement also provided for the creation of a Board of Legal Advisors within DTF, which would consist of counsel for both the plaintiff class and Facebook. The purpose of the Board of Legal Advisors would be to advise and monitor DTF to ensure that it acted consistently with its mission as articulated in the settlement agreement.

After a hearing, the district court certified the plaintiff class for settlement purposes and preliminarily approved the parties' proposed settlement. The settlement class consisted of all Facebook members who had visited the website of a Beacon participant that transmitted information about the members' activity to Facebook during the relevant period. The district court ordered Facebook to identify all class members and to send the class notification of the settlement. Following that order, Facebook identified 3,663,651 class members, to whom it provided notice of the settlement in several ways. The principal method was to send an e-mail to the class members. Facebook also posted a notice of the settlement in the "Updates" section of members' personal Facebook accounts and published a separate notice in the national edition of the newspaper USA Today. All forms of notice directed class members to a website and toll-free number that contained information about the settlement.

Also pursuant to the district court's order, notice to class members informed them of their right to opt out of the lawsuit and settlement, and to file any written comments or objections with the district court before final approval. At the conclusion of the notice period, 108 class members had opted out of the settlement, and four had filed written objections. The four class members who decided to remain in the lawsuit but file objections to the settlement were Ginger McCall, Megan Marek, Benjamin Trotter, and Patricia Burleson (collectively "Objectors").

Following a final settlement approval hearing in which the district court heard from both the parties and Objectors, the district court entered an order certifying the settlement class and approving the class settlement. The district court dismissed the plaintiffs' class action consistent with the settlement agreement, and it maintained jurisdiction over implementation of the settlement. The district court also awarded class counsel attorneys' fees in a separate order. The amount of the attorneys' fees was calculated at $2,322,763 under the "lodestar" method, meaning that the court multiplied the number of hours class counsel reasonably spent on the case by a reasonable hourly rate. That amount was combined with costs for a total attorneys' fees award of $2,364,973, which represented less than one-third of the full $9.5 million settlement amount.

Objectors now appeal, contending that the district court abused its discretion in approving the parties' settlement. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

II

A district court's approval of a class-action settlement must be accompanied by a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). Appellate review of the district court's fairness determination is "extremely limited," and we will set aside that determination only upon a "strong showing that the district court's decision was a clear abuse of discretion." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026-27 (9th Cir. 1998) (holding that district court should have broad discretion because it "is exposed to the litigants, and their strategies, positions and proof") (internal quotations omitted).

Both the district court and this court must evaluate the fairness of a settlement as a whole, rather than assessing its individual components. *See id.* at 1026. As our precedents have made clear, the question whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court. *See id.* at 1027. Although Rule 23 imposes strict procedural requirements on the approval of a class settlement, a district court's only role in reviewing the substance of that settlement is to ensure that it is "fair, adequate, and free from collusion." *See id.*

A number of factors guide the district court in making that determination, including:

the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. at 1026 (hereinafter the "Hanlon factors"). Additionally, when (as here) the settlement takes place before formal class certification, settlement approval requires a "higher standard of fairness." *See id.* The reason for more exacting review of class settlements reached before formal class certification is to ensure that class representatives and their counsel do not secure a disproportionate benefit "at the expense of the unnamed plaintiffs who class counsel had a duty to represent." *See id.* at 1027; *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 787 (3d Cir. 1995) (explaining that "[w]ith less information about the class" at the early stage before formal class certification, the court "cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses"). Accordingly, when reviewing a district court's approval of a class settlement reached before formal class certification, we will not affirm if it appears that the district court did not evaluate the settlement sufficiently to account for the possibility that class representatives and their counsel have sacrificed the interests of absent class members for their own benefit.

The settlement in this case provides for a cy pres remedy. A cy pres remedy, sometimes called "fluid recovery," *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004), is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment. As we recently recognized, the "cy pres doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011). For purposes of the cy pres doctrine, a class-action settlement fund is "non-distributable" when "the proof of individual claims would be burdensome or distribution of damages costly." *See id.* at 1038 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). The district court's review of a class-action settlement that calls for a cy pres remedy is not substantively different from that of any other class-action settlement except that the court should not find the settlement fair, adequate, and reasonable unless the cy pres remedy "account[s] for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members . . . ." *Nachshin*, 663 F.3d at 1036.

III

Objectors challenge the district court's conclusion that the settlement in this case was "fair, reasonable, and adequate" within the meaning of Rule 23(e). The district court arrived at that determination after considering Objectors' written statements and holding a fairness hearing where it provided Objectors an opportunity to be heard. The district court accompanied its fairness conclusion with findings of fact, which included the court's application of the eight Hanlon factors to the parties' settlement agreement.

Weighing those factors, the district court found that the settlement should be approved on the basis of the following: (1) reliance on novel legal theories and unclear factual issues undermined the strength of the plaintiffs' case; (2) the complex nature of the plaintiffs' claims increased the risk and expense of further litigation; (3) the class action could be decertified at any time, which "generally weighs in favor of approving a settlement"; (4) "[i]n light of [the] litigation risks and in the context of settlement claims involving infringment of consumers' privacy rights," the class's $9.5 million recovery was "substantial" and "directed toward a purpose closely related to Class Members' interests in this litigation"; (5) the parties had engaged in significant investigation and informal discovery and research, which in addition to information about Beacon that was already publicly known enabled the plaintiff class to "make an informed decision with respect to settlement, even though formal discovery" had not yet been completed; (6) the settlement was "only achieved after intense and protracted arm's-length negotiations conducted in good faith and free from collusion," and that class counsel had "reasonably concluded that the immediate benefits represented by the Settlement outweighed the possibility—perhaps remote—of obtaining a better result at trial"; (7) no government agencies voiced objections or otherwise an-nounced actions arising out of Facebook's Beacon program; and (8) only four class members objected and "slightly more than 100" from a class of over 3.6 million opted out of the settlement.

Objectors raise two issues in opposition to the district court's fairness findings. The first relates to the settlement agreement's provision for a cy pres remedy. The second relates to the overall amount of the settlement. Objectors also raise the ancillary argument that notice to class members concerning the settlement was inadequate. We address each of these issues in turn.

1

Objectors' first and strongest objection to the settlement goes to the structure of DTF, the organization that would distribute cy pres funds under the settlement agreement. Objectors contend that the presence of Tim Sparapani, Facebook's Director of Public Policy, on DTF's board of directors creates an unacceptable conflict of interest that will prevent DTF from acting in the interests of the class. Citing Six Mexican Workers, Objectors claim that the settling parties' decision to disburse settlement funds through an organization with such structural conflicts does not provide the "next best distribution" of those funds and thus is categorically an improper use of the cy pres remedy.

We disagree. Objectors' argument misunderstands the cy pres doctrine and the principle from our case law that a cy pres remedy must provide the "next best distribution" absent a direct monetary payment to absent class members. We do not require as part of that doctrine that settling parties select a cy pres recipient that the court or class members would find ideal. On the contrary, such an intrusion into the private parties' negotiations would be improper and disruptive to the settlement process. *See Hanlon*, 150 F.3d at 1027. The statement in *Six Mexican Workers* and elsewhere in our case law that a cy pres remedy must be the "next best distribution" of settlement funds means only that a district court should not approve a cy pres distribution unless it bears a substantial nexus to the interests of the class members—that, as we stated in *Nachshin*, the cy pres remedy "must account for the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members. . . ." 663 F.3d at 1036.[2]

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[2] Our decision in *Nachshin* was not published at the time of argument in this case, but the principles we announced there were well established. We discuss *Nachshin* here because it

The cy pres remedy in this case properly accounts for the factors outlined in *Nachshin*. Objectors concede that direct monetary payments to the class of remaining settlement funds would be infeasible given that each class member's direct recovery would be de minimis. Objectors also do not dispute that DTF's distribution of settlement funds to entities that promote the causes of online privacy and security will benefit absent class members and further the purposes of the privacy statutes that form the basis for the class-plaintiffs' lawsuit. Unlike the cy pres remedies we disapproved in *Nachshin* and *Six Mexican Workers*, there is no issue in this case about whether the connection between the cy pres recipients and the absent class members is too tenuous, either because the cy pres entities' missions are unrelated to the class's interests or because their geographic scope is too limited. *See Six Mexican Workers*, 904 F.2d at 1308; *Nachshin*, 663 F.3d at 1040. The cy pres remedy the settling parties here have devised bears a direct and substantial nexus to the interests of absent class members and thus properly provides for the "next best distribution" to the class.

We find no substance in Objectors' claim that the presence of a Facebook employee on DTF's board of directors categorically precludes DTF from serving as the entity that will distribute cy pres funds. As the "offspring of compromise," *Hanlon*, 150 F.3d at 1027, settlement agreements will necessarily reflect

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provides a helpful summary of existing case law on the cy pres doctrine.

the interests of both parties to the settlement, including those of the defendant. Defendants often insist on certain concessions in exchange for monetary payments or other demands plaintiffs make, and defendants can certainly be expected to structure a settlement in a way that does the least harm to their interests. Here, in exchange for its promise to pay the plaintiff class approximately $9.5 million, Facebook insisted on preserving its role in the process of selecting the organizations that would receive a share of that substantial settlement fund by providing that one of its representatives would sit on DTF's initial board of directors, and the plaintiffs readily agreed to this condition. That Facebook retained and will use its say in how cy pres funds will be distributed so as to ensure that the funds will not be used in a way that harms Facebook is the unremarkable result of the parties' give-and-take negotiations,[3] and the district court properly declined to undermine those negotiations by second-guessing the parties' decision as part of its fairness review over the settlement agreement.

We also reject Objectors' claim that the settlement agreement's cy pres structure is impermissible because the parties elected to create a new grant-making entity, DTF, rather than give cy pres funds

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[3] Objectors argue that Facebook's desire to protect its interest in the cy pres distribution process is tantamount to Facebook preserving its right to cause harm to the class. But Objectors' argument assumes a false dichotomy. It is perfectly consistent to say that DTF can be structured both to ensure Facebook's interests are not harmed and to promote the plaintiffs' general interests in the causes of online privacy and security.

to an already-existing online privacy organization. Again citing *Six Mexican Workers*, Objectors argue that DTF has "no substantial record of service" and is therefore inherently disfavored as a cy pres recipient. But we have never held that cy pres funds must go to extant charities in order to survive fairness review, and a settlement agreement that provides for the formation of a new grant-making organization is not subject to a more stringent fairness standard. The reason we found it relevant in *Six Mexican Workers* that the charity organization designated to receive cy pres funds had no "substantial record of service" was that there was no way of knowing whether the organization would use the funds to the benefit of class members. *See Six Mexican Workers*, 904 F.2d at 1308. Here, there is no such worry, because the settlement agreement and DTF's Articles of Incorporation tell us exactly how funds will be used—to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats."[4] As we have explained, that mission statement provides the requisite nexus between the cy pres remedy and the interests

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[4] Objectors suggest that there is no assurance that DTF would perform in accordance with the strictures of its charter document, but that is unsupported speculation. There is no reason to suppose that both the Board of Legal Advisors (consisting of both the settling parties' counsel) and the district court (which retained jurisdiction over implementation of the settlement) would abdicate their responsibility to ensure that DTF performs according to the settlement agreement.

furthered by the plaintiffs' lawsuit consistent with the principles we announced in *Nachshin*.

Objectors' contention that the settling parties were prohibited from creating DTF to disburse cy pres funds is without merit, and the district court did not abuse its discretion in so concluding.

2

Objectors' second argument on appeal is that the district court did not sufficiently evaluate the plaintiffs' claims and compare the value of those claims with the class's $9.5 million recovery in the settlement agreement. Objectors contend that the value of the plaintiffs' claims was in fact greater than the $9.5 million the plaintiffs settled for, in large part because some unidentified number of the class members may have a claim under the Video Privacy Protection Act ("VPPA"). The VPPA prohibits any "video tape service provider" from disclosing "personally identifiable information" about one of its consumers, and it provides for liquidated damages in the amount of $2,500 for violation of its provisions. 18 U.S.C. §§ 2710(b) and 2710(c)(2). Objectors contend that the district court was not sufficiently mindful of the possibility that the class's VPPA claims would yield a high recovery at trial, and that the court would not have approved a settlement of $9.5 million if it had paid the proper attention to that possibility.

As an initial matter, we reject Objectors' argument insofar as it stands for the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award. While a district court must of course assess the plaintiffs' claims in determining the strength of their case relative to the risks of continued litigation, see *Hanlon*, 150 F.3d at 1026, it need not include in its approval order a specific finding of fact as to the potential recovery for each of the plaintiffs' causes of action. Not only would such a requirement be onerous, it would often be impossible—statutory or liquidated damages aside, the amount of damages a given plaintiff (or class of plaintiffs) has suffered is a question of fact that must be proved at trial. Even as to statutory damages, questions of fact pertaining to which class members have claims under the various causes of action would affect the amount of recovery at trial, thus making any prediction about that recovery speculative and contingent.

Relatedly, the district court was not required to include among its findings specific commentary on each of the plaintiffs' five statutory claims. All of the plaintiffs' claims arise under similar privacy statutes, and as Facebook correctly points out, the plaintiffs' likelihood of success with regard to each of those claims depends on the same basic legal theories and factual issues. The district court acted properly in evaluating the strength of the plaintiffs' case in its entirety rather than on a claim-by-claim basis. *See Hanlon*, 150 F.3d at 1026.

Moreover, the record contradicts Objectors' general argument that the district court did not meaningfully account for the potential value of the plaintiffs' claims, including any claims under the VPPA. Both before and after the final settlement approval hearing, the district court specifically addressed the possibility that the presence of VPPA claims among some class members might affect the class settlement. In its order preliminarily approving the settlement, the district court notified the parties that "final approval will require a sufficient showing that terms of the settlement are reasonable, specifically in light of the claims under the VPPA, and the apparent availability of statutory penalties thereunder" (emphasis added). Following the district court's instructions, the parties did address the VPPA issue in their briefing and arguments at the final approval hearing. The district court also heard from Objectors at that hearing, who again argued that the settlement was too low in light of the possibility of recovery under the VPPA.

The district court rejected that argument. It first observed that Objectors had not "brought to the Court's attention any cases in which plaintiffs have been awarded multiple liquidated damages," which if available would likely increase the class's potential recovery under the VPPA substantially (even if only a small number of class members had VPPA claims). The district court further noted that bringing the VPPA claims to trial would involve significant risk for the class given that the plaintiffs' claims relied on "novel legal theories" and "vigorously disputed" factual issues concerning the Beacon program. And although the district court did not mention it in its approval order, the parties had presented evidence to the court that Blockbuster, one of the only defendants that might qualify as a "video tape service provider" and therefore be subject to liability under the VPPA, was on the verge of bankruptcy, likely making any substantial damages against it annihilative. Based on its consideration of these factors, the district court concluded that the "$9.5 million offered in settlement is substantial."

That conclusion was not an abuse of the district court's broad discretion. A $9.5 million class recovery would be substantial under most circumstances, and we see nothing about this particular settlement that undermines the district court's conclusion that it was substantial in this case. Objectors are no doubt correct that the VPPA claims of some class members might prove valuable if successful at trial, but that does not cast doubt on the district court's conclusion as to the fairness and adequacy of the overall settlement amount to the class as a whole. It is an inherent feature of the class-action device that individual class members will often claim differing amounts of damages—that is why due process requires that individual members of a class certified under Rule 23(b)(3) be given an opportunity to opt out of the settlement class to pursue their claims separately, as were the class members in this case. *See Hanlon*, 150 F.3d at 1024. But a class-action settlement necessarily reflects the parties' pre-trial assessment as to the potential recovery of the entire class, with all of its class members' varying claims. So even if some of the class members in this case would have successful claims for $2,500 in statutory damages under the VPPA, those individuals represent, to use the candid phrasing of Objectors, "only a fraction of the 3.6 million-person class." Their presence does not in itself render the settlement unfair or the $9.5 million recovery among all class members too low.[5]

Objectors rely significantly on *Molski v. Gleich*, 318 F.3d 937, 949 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), in claiming that the cy pres remedy here "did not adequately protect the interests of the class," but that case does not support Objectors' argument. *Molski* involved a settlement that required the defendant to pay $195,000 in cy pres funds in exchange for a release of all the disability-related claims of a large class. 318 F.3d at 943-44. The district court in *Molski* had certified a mandatory settlement class under Rule 23(b)(2) without providing class members an opportunity to opt out of the settlement. *Id.* at 947. In addition to holding that the inability to opt out of the settlement violated class members' due process rights, we held that "use of the cy pres award was inappropriate" under the circumstances because the parties had not made any showing that direct distribution of

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[5] Although a settlement is not categorically unfair for certain class members simply because they might recover higher damages than other class members were they to prosecute their claims individually, significant variation in claimed damages among class members is relevant to the Rule 23(b)(3) "predominance"analysis during class certification. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624-25, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). However, Objectors do not challenge the district court's class certification or its decision to include individuals with VPPA claims in the settlement class, so we express no opinion on that issue here.

settlement funds to the class would be burdensome or costly. *Id.* at 954-55. We also found "troubling" that the class's recovery under the settlement was so low relative to the high number of potential class members. *See id.*

Unlike the $195,000 cy pres fund in *Molski*, the settlement in this case provides for a substantial $9.5 million pay-out by Facebook for the benefit of the class and thus does not present a situation in which class representatives and counsel accepted their respective fees as a quid pro quo for quietly going away while the class receives virtually nothing. *See id.* at 953-54. Also fundamentally different is that class members here received notice and were given the opportunity to opt out of the settlement. And, most essentially, there is no dispute that it would be "burdensome" and inefficient to pay the $6.5 million in cy pres funds that remain after costs directly to the class because each class member's recovery under a direct disbribution would be de minimis. *See id.* at 955. These features distinguish the present case from *Molski* and help to account for why the latter was one of the "rare" cases where we have intruded into the discretion of the district court by setting aside its determination that a settlement agreement is fundamentally fair. *See Staton v. Boeing Co.*, 327 F.3d. 938, 960-61 (9th Cir. 2003).

The record here convincingly establishes that the district court accounted for the potential value of the VPPA claims of some class members, and the district court's review of the circumstances surrounding the settlement was sufficiently comprehensive to ensure that class representatives and their counsel did not throw absent class members under the proverbial bus to secure a disproportionate benefit for themselves. *See Hanlon*, 150 F.3d at 1027. That review was accordingly compliant with this circuit's requirement that the district court apply heightened review to a class-action settlement reached before formal certification. *See id.* at 1026. This is particularly manifest in that the district court's detailed approval order included the specific factual finding that the settlement agreement "was only achieved after intense and protracted arm's-length negotiations conducted in good faith and free from collusion." Objectors have not made any showing, let alone a "strong" one, that this or any of the district court's other findings was erroneous or amounted to a "clear abuse of discretion." *See id.* at 1027.

Finally, the litigants devote several pages of briefing to a dispute over whether the settlement agreement's provision mandating the permanent termination of the Beacon program provided any meaningful relief to the plaintiff class. Specifically, Objectors argue that Facebook's promise to terminate Beacon is "illusory" because the original program was non-operational at the time of the settlement agreement and thus already "effectively terminated." In light of our holding affirming the district court's conclusion that the $9.5 settlement award substantially furthers the interests of the class, Objectors' argument that Facebook's promise to terminate Beacon provides no meaningful relief is of little moment, and in any event we find that it is without merit. Even assuming Objectors' premise that Beacon was already effectively terminated, absent a judicially-enforceable agreement, Facebook would be free to revive the program whenever it wanted. It is thus false to say that Facebook's promise never to do so was illusory.

We affirm the district court's holding that the settlement was fundamentally fair.

IV

Objectors argue additionally that the notice provided to class members during the opt-out period was insufficient because it did not describe the value of the plaintiffs' statutory claims and "did not accurately describe what the class members would receive in exchange for the release" of those claims. Objectors argue in particular that the notice should have included a description of the VPPA statute, that it should have alerted class members that a Facebook employee would be on the board of the organization distributing cy pres funds, and that its reference to Facebook's promise to terminate Beacon was misleading because Beacon was already dormant.

We disagree. Notice provided pursuant to Rule 23(e) must "generally describe[ ] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009) (internal quotations omitted). That standard does not require detailed analysis of the statutes or causes of action forming the basis for the plaintiff class's claims, and it does not require an estimate of the potential value of those claims. *See id.* (notice need not include "expected value of fully litigating the case"). Nor is there any particular requirement that notice in a class-action settlement involving a cy pres remedy name the individuals sitting on the cy pres recipient's board of directors, even if one of those individuals has some association with the defendants in the case. Finally, for the same reasons we reject Objectors' argument that Facebook's promise to terminate Beacon was illusory, there was nothing misleading about referencing that promise in the class notice.

We agree with the district court that the notice in this case adequately apprised class members of all material elements of the settlement agreement and therefore complied with the requirements of Rule 23(e).

V

Ultimately, we find little in Objectors' opposition to the settlement agreement beyond general dissatisfaction with the outcome. That dissatisfaction may very well be legitimate insofar as Objectors would have acted differently had they assumed the role of class representatives. But while Objectors may vigorously disagree with the class representatives' decision not to hold out for more than $9.5 million or insist on a particular recipient of cy pres funds, that disagreement does not require a reviewing court to undo the settling parties' private agreement. The district court properly limited its substantive review of that agreement as necessary to determine that it was "fair, adequate, and free from collusion." *See id.*

AFFIRMED.

KLEINFELD, Senior Circuit Judge, dissenting:

I respectfully dissent. This settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class.

A. The Facts.

1. "Beacon."

Millions of people connect themselves to their "friends" on Facebook. Some Facebook "friends" are friends in the traditional sense, people we know and like. Some are more in the nature of contacts, or acquaintances, or people we think may want to see what we post. For people who regularly use Facebook to communicate, "friends" may merely be their address book. The lead plaintiff in this case, Sean Lane, had over 700 Facebook "friends." Facebook operates like a bulletin board, so that "friends" can see whatever a user chooses to post and not make private.

Facebook is "free," furnished without a subscription price. The company makes money by selling advertising. To make such sales more lucrative, Facebook started a program called "Beacon" in November 2007. Like an actual beacon, the program shone light to make something easier to see: in this case, a user's "friends" could see whatever he had bought from companies that paid Facebook to participate in Beacon. Over forty companies signed up for Beacon, including Blockbuster, a movie retailer, Zappos, a shoe and clothing retailer, and Overstock.com, a discounter. If a Facebook user rented a movie from Blockbuster, for example, Facebook told all his friends what movie he had rented. Facebook told retailers, "Facebook Beacon enables your brand or business to gain access to viral distribution within Facebook. Stories of a user's engagement with your site . . . . will act as word-of-mouth promotion for your business and may be seen by friends who are also likely to be interested in your product."

Many Facebook users strongly objected to losing the privacy of their purchases. After all, people ordinarily post on their Facebook page only what they want to post, and they had not elected to tell all their "friends" what they had just bought. Some people buy things on the internet precisely because they want more privacy than they would have at a local store. Beacon took away their privacy, and broadcast their purchases to people who users wanted to remain in the dark.

Worse, Facebook made it very hard for users to avoid these broadcasts. The user had to actively opt out. And opting out required video game skills. The user would get a pop-up on his screen asking whether he wanted to opt out, but the pop-up would disappear in about ten seconds. Too slow reading the pop-up or clicking the mouse, and all a user's "friends" would know exactly what he had bought. Since the pop-up disappeared so quickly, someone looking at another window, or answering the phone, or just not paying attention, would likely not even be aware of the opt-out option before it disappeared.

Plaintiff Sean Lane alleges in the complaint that he bought a ring from Overstock.com as a surprise for his wife, but before he gave it to her, Facebook ruined the surprise by spreading the news to his over 700 "friends," including many alumni in his college class. Ginger McCall states that her video rentals at Blockbuster were disclosed to all her "friends." Of the vast number of people whose purchases were broadcast, no doubt some suffered embarrassment, and some suffered damage to employment, business, or personal relationships. Some Blockbuster rentals doubtless included erotica, some Overstock.com purchases probably included gifts meant to look more expensive than they were, and some Zappos purchases were probably more extravagant than purchasers' spouses were aware. Someone who had told her college classmate that she could not attend her wedding because she could not afford the plane fare could lose a friend when Facebook told her classmate that she'd bought $400 shoes. Mr. Lane complains that his wife asked him about his ring purchase before he gave it to her, ruining his Christmas gift to her. His wife might also have been less impressed by the ring than he had hoped, since she and all his other friends could click a link and see that he had bought it cheaply — good for advertising Overstock.com, bad for advertising Mr. Lane's generosity.

Many users' private purchases were exposed, and over 50,000 complained. Within a few weeks (long before this lawsuit was filed), Facebook eliminated the opt-out Beacon program. Facebook changed it to an opt-in program, so that users did not need to maintain video game alertness to avoid disclosure to all their friends. In the opt-in version of Beacon, purchases made in private stayed private unless the user expressly allowed Facebook to publicize them. One of the objectors to the settlement, Ginger McCall, says her movie rentals were disclosed even after Beacon had supposedly changed to an opt-in, and no findings have been made on whether the opt-in worked or was tricky to operate.

2. The Settlement.

This lawsuit was filed in August 2008, about eight months after the opt-out version of Beacon had ended. The complaint challenged only the opt-out program that had lasted for a few weeks, not the opt-in version that had been in place since then. The parties mediated and settled, all before any class was certified. They agreed to end Beacon, both opt-in as it then was, and opt-out as it had been originally.

The settlement agreement approved by the district court (mistakenly, in my view) greatly changed the class aspect of the case. First, the parties agreed to certify the class for purposes of settlement. Second, they agreed to expand it far beyond what the complaint had sought. The complaint sought damages only for users affected during the few weeks when they had to opt out, but the settlement expanded the class to include everyone affected during the much longer opt-in period. Since the members of the class got no money from the settlement, the effect of certification and expansion was to bar any claims the expanded class might have, not to provide more people with recompense. In exchange for nothing, class members were barred from suing Facebook, Blockbuster, Overstock.com, or any of the other defendants for any claims arising from or relating to Beacon, "including, without limitation, arising from or related to data gathered from Beacon."

The majority states that Facebook promised never to revive the Beacon program, but this is not quite right. Facebook remained free to revive the program, even the cancelled version under which the subscriber had only a few seconds to opt out. The only limitation the settlement imposed was that Facebook had to call the Beacon program by some other name. The agreement said that Facebook would terminate "the Beacon Program," and defined "Beacon" to mean "the program launched by Facebook on November 6, 2007 and all iterations thereof bearing the 'Beacon' name" (emphasis added). The district judge asked about this term, and plaintiffs' attorney expressly conceded that Facebook was free to reinstitute the same program under a different name. "[T]he problem was when you tried to describe the functionality and you preclude Facebook from using that functionality going forward, it becomes truly problematic and becomes impossible to reach an agreement because you're limiting their ability to run their business. . . . At the end of the day, we could not reach agreement with defendants regarding limiting their future actions as a corporation." That was an on the record concession that the injunction meant as little as it said, and Facebook remained free to do what it had done before, under a different name. The injunctive relief the class received was no relief at all, not even a restriction on future identical conduct.

Facebook users who had suffered damages from past exposure of their purchases got no money, not a nickel, from the defendants. Even those who had rented videos, and were arguably entitled to statutory damages of $2,500 for each disclosure, got nothing.[1] Class counsel, on the other had, got millions. Plaintiffs' lawyers and Facebook agreed that Facebook would not object to attorneys' fees up to one third of what they called the "settlement fund." One third would be a fee of $3,166,667. The fee would come out of the "settlement fund" and would not be in addition to it, so Facebook had no economic interest in reducing the amount. The fee

[1] 18 U.S.C. § 2710(b)(1), (c)(1)-(2) ("A video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable . . . . Any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court. The court may award -- (A) actual damages but not less than liquidated damage in an amount of $2500; (B) punitive damages; (C) reasonable attorneys' fees and other litigation costs reasonably incurred; and (D) such other preliminary and equitable relief as the court determines to be appropriate.").

actually approved by the district court was $2,322,763 plus costs of $42,210.58, 25% of the "settlement fund." That $2.3 million payment was for getting their clients nothing and barring all the claims of a vastly broadened class.

Not a cent of the remaining "settlement fund" money would go to the Facebook users on whose behalf class counsel purportedly settled. The only exceptions were $10,000 to Mr. Lane, $5,000 each to two others, and $1,000 each to the other 19 named plaintiffs, amounting to $39,000 for the few people in the class who presumably had personally agreed to have class counsel represent them.

The remaining millions were to go to a new "privacy foundation" that did not yet exist. The board of the new foundation would be three directors to be agreed upon by Facebook and class counsel, or if they disagreed one chosen by each and the third chosen by those two. Under the agreement, all three directors could come from the Facebook advertising and sales staff if class counsel and Facebook so chose. The board of directors of this "privacy foundation" was to be advised by Facebook's own lawyer and class counsel. The agreement provided that the "privacy foundation" was to use its millions to "fund projects and initiatives that promote the cause of online privacy, safety, and security" however its Facebook-friendly board chose.

B. Analysis.

The class action rule[2] was designed to facilitate lawsuits where individuals' or small groups' judgments would not add up to enough money to justify hiring lawyers, but judgments for large numbers of similarly situated victims of misconduct would. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."[3]

This procedural device has obvious attendant risks, because class counsel's "clients" are not clients at all in the traditional sense; they do not hire the lawyer, they do not agree on a fee with him, and they do not control whether he settles their case. They are in no position to prevent class counsel from pursuing his own interests at their expense.[4] The named plaintiffs, those who actually have some chance of directing their lawyers, typically get amounts of cash without much relation to their individual damages,

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[2] Fed. R. Civ. P. 23.

[3] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

[4] *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 959-60 (9th Cir. 2003).

so their incentives align more with class counsel than with their fellow class members.

Defendant and class counsel, in any class action, have incentives to collude in an agreement to bar victims' claims for little or no compensation to the victims, in exchange for a big enough attorneys' fee to induce betrayal of the interests of the purported "clients." The defendant's agreement not to oppose some amount for the fee creates the same incentive as a payment to a prizefighter to throw a fight. A real client may refuse a settlement that is bad for him but benefits his lawyer, but a large class of unknown individuals lacks the knowledge or authority to say no. It is hard to imagine a real client saying to his lawyer, "I have no objection to the defendant paying you a lot of money in exchange for agreement to seek nothing for me." "The absence of individual clients controlling the litigation for their own benefit creates opportunities for collusive arrangements in which defendants can pay the attorneys for the plaintiff class enough money to induce them to settle the class action for too little benefit to the class (or too much benefit to the attorneys, if the claim is weak but the risks to the defendants high)."[5]

Rule 23 protects against these risks much as the courts have traditionally protected against similar risks when attorneys represent children, estates of deceased persons, and unknown persons, by

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[5] *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999).

requiring judicial approval of settlements. Approval and review, though, are a weak substitute for real clients, because judges know little about the case beyond what the lawyers tell them. That works much better when the lawyers are on different sides than when they are on the same side. Judges also may face an incentive problem, where a heavy docket cannot easily withstand the additional weight of a huge lawsuit that does not settle. Objectors provide a critically valuable service of providing knowledge from a different point of view, but one that is too often not used effectively. Our review process is supposed to assure that settlement of a class action, despite the risk of perverse incentives, is "fair, reasonable, and adequate"[6] and that notice is given "in a reasonable manner"[7] so that those bound by the settlement have an opportunity to be heard.

In this case, the process has failed. The attorneys for the class have obtained a judgment for millions of dollars in fees. The defendant, Facebook, has obtained a judgment that bars claims by millions of people victimized by its conduct. So have the other companies involved in Beacon. The victims, on the other hand, have obtained nothing. Under the settlement, Facebook even preserved the right to do the same thing to them again.

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[6] Fed. R. Civ. P. 23(e)(2).

[7] Fed. R. Civ. P. 23(e)(1).

1. The Settlement is Unfair, Unreasonable, and Inadequate.

The factors for evaluating class action settlements[8] are multifarious and indeterminate, but the cases have become less tolerant of settlements not beneficial to class members. We used to be extremely deferential when district courts approved settlements, as in *Hanlon v. Chrysler Corp.*,[9] the 1998 case on which the majority relies. We have in the last few years become much less so, as in our recent decisions *In re Bluetooth*,[10] *Nachshin v. AOL, LLC*,[11] and *Dennis v. Kellogg Co.*[12] We still exercise

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[8] *See, e.g., Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.") (citation omitted); *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) (noting that such factors are "by no means an exhaustive list of relevant considerations . . . . The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circum-stances presented by each individual case.").

[9] *Hanlon*, 150 F.3d 1011.

[10] *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

[11] *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011).

deferential review for abuse of discretion, but do so in light of what we rejected in *Bluetooth*, *Nachshin*, and *Dennis*. Review for abuse of discretion has never meant that we will affirm whatever a district court does.[13]

An extremely important qualification even in Hanlon was a "higher standard of fairness"[14] when settlement is reached before a class is certified. In this case, not only was settlement reached before class certification, but the class certified for settlement purposes was far broader than the one sought when the case was filed. The *Hanlon* "higher standard of fairness" matters because of "the dangers of collusion between class counsel and the defendant."[15] *Bluetooth* emphasizes the need for greater scrutiny of precertification settlement on behalf of a class.[16] "Collusion may not always be evident on the face of a settlement, and courts therefore must be particularly vigilant not only for

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[12] *Dennis v. Kellogg Co.*, 687 F.3d 1149, 2012 WL 2870128 (9th Cir. 2012).

[13] *Cf. Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1307-09 (9th Cir. 1990) (finding that a district court's use of cy pres to distribute unclaimed settlement funds was an abuse of discretion because it did not "adequately target the plaintiff class and fail[ed] to provide adequate supervision over distribution").

[14] *Hanlon*, 150 F.3d at 1026; *see also Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003), *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

[15] *Hanlon*, 150 F.3d at 1026.

[16] *In re Bluetooth*, 654 F.3d 935, 946-47 (9th Cir. 2011).

explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations."[17]

Collusion is far more likely before certification, and exponentially higher if the class is expanded as part of the settlement. Here is why. If a lawsuit is only on behalf of named plaintiffs, damages are limited to what they may properly receive, so if a case is reasonably defensible, a defendant may make a sound financial decision to defend. But if a vast class is certified, then even a meritless case may require a defendant to settle or bet all the money it has or can borrow for attorneys' fees, because even a very small chance of a very large verdict is too much to risk. Plaintiffs' counsel want certification, to make the damages enough to be worth the time and expense of the litigation. Defense counsel oppose it, to keep the risk down to a level where they can afford the risk of litigation. Because certification of a class may turn even a meritless plaintiff's case into a bet-the-company defendant's case, defendants usually vigorously oppose class certification, giving courts the benefit of adversarial presentations.

Once the parties agree to settle, and agree to certify a class, defendant's interests are reversed. Plaintiffs' counsel still have an interest in keeping a large class certified, because the larger the class, the higher the attorneys' fees are likely to be. But if the defendant will get a bar against claims, almost always a term

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[17] *Id.* at 947.

of any settlement, the more people whose claims are barred the better. The risk of having to pay out a huge amount of money gets converted, by class certification, into a certainty that vast numbers of people will be unable to sue the defendant. So when settling before class certification, and agreeing upon class certification as part of the settlement, both sides have the same incentive, to certify the class and make it as vast and all-encompassing as possible. It is a bonanza for the defendant if it can bar the claims not only of everyone in the class described in the complaint, but also of a much larger class on whose behalf more and different claims might have been asserted.

And that is just what happened here. The complaint claims wrongdoing against and damages to Facebook users during the few weeks of the opt-out period of "Beacon." The settlement bars claims of all the users during that period and during the much longer opt-in period. When they settled, Facebook and class counsel shared the same interest, as broad a class certification as possible. Ideally, from both the point of view of both sides' interests (attorneys' fees for one side, protection from claims for the other) the class would include everyone in the world, and bar all claims of any kind from the beginning of time to the present day. They came about as close to that as they plausibly could.

Bluetooth emphasizes that "clear sailing" agreements on attorneys' fees are important warning signs of collusion.[18] We have a version of a clear sailing agreement here: Facebook's agreement not to oppose an attorneys' fees claim of up to $3,166,667. If, as here, the defendant agrees not to oppose an attorneys' fees claim, and defendants payout will be the same no matter how high the fee is, then both sides have an incentive to make the fee large enough to induce plaintiffs' counsel to sacrifice class interests to plaintiffs' attorneys' interests. *Bluetooth* holds that caution is especially necessary when, as here, members of the class receive no money, but class counsel receive a great deal of it.[19] As the amount of the fee to which no objection will be made grows, especially if the fee will not affect the cost to the defendant, it makes economic sense (though not ethical sense) for plaintiffs' counsel to throw the fight for the money.

Strikingly, the settlement here goes even further than coupon settlements, where class members get only discounts if they buy again from the defendant claimed to have wronged them before, while their purported lawyers get huge amounts of money. Here the Facebook users get nothing at all, not even coupons. Every nickel of the remainder of the $9,500,000 after class counsel's cut, administrative

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[18] *In re Bluetooth*, 654 F.3d at 947 ("[A] 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds . . . carries the potential of enabling a defendant to pay class counsel excessive fees and costs in exchange for counsel accepting an unfair settlement on behalf of the class.") (citation and quotation omitted).

[19] *Id.* at 947.

costs, and incentive payments to the named plaintiffs, goes not to the victims, but to an entity partially controlled by Facebook and class counsel. The new entity, dressed to look good in old law French with its "cy pres" award and "non-profit" status, can spend the money to "educate" people about privacy on the internet, perhaps via some instructional videos on how to use all the privacy features available in Facebook.

Arguably, no harm would be done if all claims of wrong-doing to Facebook users from the Beacon program were frivolous. If their claims were worthless, then no wrong is done to them when those claims are barred and $9.5 million gets transferred to some lawyers they never met and a new entity not likely to benefit them. But that would denigrate the claims too far. There is reason to believe that Facebook needed the shield its $9.5 million bought. Facebook got customer complaints and bad publicity from the opt-out Beacon program. The class had colorable claims. Facebook had a good argument that it was not itself a "video tape service provider" under the federal statute entitling a customer to liquidated damages of $2,500 for disclosure of what videotape someone had rented from Blockbuster,[20] but still had a risk of some sort of vicarious, joint, or "civil conspiracy" liability.[21] If found liable, it was a deep

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[20] 18 U.S.C. § 2710(a)(4), (c)(2).

[21] In their complaint, Plaintiffs claimed that Facebook was engaged in a civil conspiracy to violate the Video Privacy Protection Act. *See Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454, 457

pocket target for the punitive damages for which the statute expressly provides.[22] And at least one federal district court has taken an expansive view of who is a "video tape service provider" prohibited from making disclosures.[23] The facts alleged in the complaint stimulate a concern about the privacy of people's purchases on the internet and the use of customer information by Facebook.

Tort law tends to evolve to make actionable conduct widely seen as harmful, especially when the conduct is willful, as it was here. The plaintiffs' claims and the risk of that evolution of tort law were worth money to avoid, for Facebook. We cannot reasonably say that a risk worth $9.5 million to Facebook to avoid nevertheless had no value whatsoever to the potential claimants whose claims presented that risk. If Facebook users had no colorable claims, why would Facebook have paid $9.5 million to bar them?

2. The Settlement does not Meet our Standards for Cy Pres Awards.

Even if the $9.5 million number, the attorneys' fees, and the absence of any relief whatsoever to class members all were "fair, reasonable and adequate," the new foundation would still not satisfy the standards for cy pres awards. We held in *Dennis v.*

(Cal. 1994) (giving an overview of the California law of civil conspiracy).

[22] 18 U.S.C. § 2710(c)(2)(B).

[23] *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154, 1167 (W.D. Wash., 2010).

Kellogg Co.[24] quoting *Staton v. Boeing Co.*,[25] that cy pres distributions present "a particular danger" that "incentives favoring pursuit of self-interest rather than the class's interests in fact influenced the outcome of negotiations."[26]

Cy pres traditionally was a means by which, say, a bequest to a charity no longer existing when a testator died might be given instead to a similar charity doing similar work. Thus a bequest to the Boys' Club might go to its replacement, the Boys' and Girls' Club. The doctrine has never meant simply that money for harm to someone would be given to someone else preferred by the defendant and plaintiff's attorney and perhaps by the court. We cautioned in *Nachshin v. AOL* that "When selection of cy pres beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court."[27]

The rules of judicial ethics have in many forms for over a hundred years prohibited judges from endorsing charities, because of the risk that lawyers and litigants will feel compelled to contribute to

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[24] *Dennis v. Kellogg Co.*, 687 F.3d 1149, 2012 WL 2870128 (9th Cir. 2012).

[25] *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003).

[26] *Dennis v. Kellogg Co.*, 687 F.3d 1149, 2012 WL 2870128, at *6.

[27] *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

them.[28] Too liberal an approach to cy pres means that a court may simply order, and not merely encourage, someone subject to its jurisdiction to give to a preferred charity. A defendant may prefer a cy pres award to a damages award, for the public relations benefit. And the larger the cy pres award, the easier it is to justify a larger attorneys' fees award. The incentive for collusion may be even greater where, as here, there is nothing to stop Facebook and class counsel from managing the charity to serve their interests and pay salaries and consulting fees to persons they choose.

Nachshin holds that the district court must ensure that a cy pres award targets the plaintiff class.[29] Here it does not. *Six Mexican Workers v. Arizona Citrus Growers*[30] holds that a district court must reject awards that provide "no reasonable certainty that any member will be benefitted."[31] This one does

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[28] Canon 25 of the Canons of Judicial Ethics, first adopted by the ABA in 1924, states that a judge "should not solicit for charities, nor should he enter into any business relation which . . . might bring his personal interest into conflict with the impartial performance of his official duties."Henry S. Drinker, Legal Ethics 274, 333 (1965). The current ABA Model Rules have similar language. Model Code of Judicial Conduct R. 3.7 (2007). Something akin to this was an issue in *Nachshin*, where the judge's husband sat on the board of a legal aid foundation that was to receive a donation as part of the settlement. *Nachshin*, 663 F.3d at 1041.

[29] *Nachshin*, 663 F.3d at 1039-40.

[30] *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301(9th Cir. 1990).

[31] *Id.* at 1308.

not. We require an established record of performance by the charity of acts beneficial to people in the wronged class.[32] The cy pres award in this case goes to a new entity with no past performance at all. For all we know it will fund nothing but an "educational program" amounting to an advertising campaign for Facebook. That would appear to satisfy the articles and bylaws, and Facebook, after all, together with class counsel and their nominees, will run it.

3. Notice.

We review adequacy of notice de novo, not deferentially.[33] This is because notice is a matter of due process of law.[34] If a person owns a claim, it is property, and the owner of the claim is constitutionally entitled not to have it taken from him except with reasonable notice and an opportunity to be heard. Notice in this case was inadequate, most obviously because the class was not sufficiently informed that Facebook itself might be in control of the money purportedly awarded on account of wrongs it committed against class members. The articles of incorporation and bylaws of the purportedly charitable foundation were posted online for the class to see only a week before the deadline to opt out of the settlement. Those documents said that "Tim Sparapani" would be on

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[32] *Id.*

[33] *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994).

[34] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998).

the three-person board, but failed to mention who he was, Facebook's own Director of Public Policy. Nor did the notice say that Facebook's counsel, Michael Rhodes, would sit on the foundation's legal advisory board. Class members would have had to look carefully at the settlement agreement and figure out that Mr. Rhodes, the man designated as a legal advisor on page twelve of the settlement agreement, was the same man listed as Facebook's attorney on page five. Class members dependant on the notice would have no idea that the money supposedly paid for wrongs to them was to be spent by agents of the purported wrongdoer.

Conclusion

The majority approves ratification of a class action settlement in which class members get no compensation at all. They do not get one cent. They do not get even an injunction against Facebook doing exactly the same thing to them again. Their purported lawyers get millions of dollars. Facebook gets a bar against any claims any of them might make for breach of their privacy rights. The most we could say for the cy pres award is that in exchange for giving up any claims they may have, the exposed Facebook users get the satisfaction of contributing to a charity to be funded by Facebook, partially controlled by Facebook, and advised by a legal team consisting of Facebook's counsel and their own purported counsel whom they did not hire and have never met.

Facebook deprived its users of their privacy. And now they are deprived of a remedy.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

SEAN LANE, et al., Plaintiffs v. FACEBOOK, INC., et al., Defendants.

No. C 08-3845 RS

March 17, 2010, Decided

March 17, 2010, Filed

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER APPROVING SETTLEMENT

A hearing was held before this Court on February 26, 2010, pursuant to the Court's Preliminary Approval Order of October 23, 2009, upon a Settlement Agreement, dated as of September 17, 2009 (the "Settlement Agreement") in the above-captioned Litigation. Due notice of the hearing was given in accordance with the Preliminary Approval Order which was adequate and sufficient and in accordance with the Court's Preliminary Approval Order. The represented parties appeared by their attorneys of record, and an opportunity to be heard was given to all other persons desiring to be heard as provided in the notice. The Court has considered the terms of the proposed Settlement as set forth in the Settlement Agreement, and the submissions and arguments with respect to it. Accordingly, the Court makes following findings and orders thereon:

A. This Court has jurisdiction over the subject-matter of the Litigation pursuant to Title 28, United

States Code, section 1332, and all acts within the Litigation, and over all the parties to the Litigation, and all members of the Settlement Class.

B. This Order incorporates herein and makes a part hereof the Settlement Agreement, including the Exhibits thereto. Unless otherwise provided herein, the terms defined in the Settlement Agreement shall have the same meanings for purposes of this Order.

C. Notice to the Settlement Class and other potentially interested parties has been provided in accordance with the notice requirements specified by the Court in the Preliminary Approval Order. Additionally, subsequent to preliminary approval, the parties proposed amending the notice requirements to specify that Class members would be given notice by email to the Class members' email addresses on file with Facebook, in lieu of an internal Facebook message in the 'Updates' Section." The Court declined to execute the parties' stipulation, instead inquiring if it would be more appropriate to utilize email notice in addition to that specified in the Preliminary Approval Order, rather than in lieu of it. Although the Preliminary Approval Order was never expressly amended to require it, notice was thereafter given by email in addition to the other forms of notice. Such notice fully and accurately informed the Settlement Class Members of all material elements of the proposed Settlement and of their opportunity to object to, comment thereon, or exclude themselves from, the Settlement. It provided Settlement Class Members adequate instructions and a variety of means to obtain additional information and represented the best notice practicable under the circumstances. The notice was valid, due, and sufficient to all Settlement Class Members and complied fully with the laws of the of State of California, the Federal Rules of Civil Procedure, the United States Constitution, due process and other applicable laws. Notice was given in a timely manner pursuant to the Order of this Court on Preliminary Approval and provided adequate time for Class Members to comment and object. Further, this Court finds that adequate notice was provided as required under the Class Action Fairness Act.

D. One individual objector submitted an objection complaining that the email notice he was given was intercepted by his email program's "spam filter." The objector asserted that this occurred despite the fact that he has received other email from Facebook that was not filtered. Although it is not entirely clear how or why this may have occurred, the Court is satisfied that the possibility that some Class members have activated settings on their email accounts that might filter the email notices does not undermine the overall adequacy of the notice given. Indeed, even the objector appears to have received actual notice via email, albeit only because he checked the contents of his spam filter, which not all Class members may have done.

E. A full opportunity was afforded to the Settlement Class Members to participate in, comment on, opt-out and/or object to the Settlement, notice and claims procedure. A list of those members of the Settlement Class who timely opted-out of the Settlement and the Settlement Class and who therefore are not bound by the Settlement, the provisions of the Settlement Agreement, this Order and the Judgment to be entered by Clerk of Court, hereon, has been submitted by the Claims Administrator and is attached hereto as Exhibit A and incorporated by reference herein. All other members of the Settlement Class (as permanently certified below) shall be subject to all of the provisions of this Order.

F. Federal Rule of Civil Procedure 23(a) lists four conjunctive criteria that must be met to certify a class action: numerosity, commonality of issues, typicality of the representative plaintiffs' claims, and adequacy of representation. A class may only be certified if the court is "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Based on the record before the Court, including all submissions in support of the Settlement Agreement, objections, comments and responses thereto, as well as the settlement set forth in the Settlement Agreement, this Court finds that the applicable requirements of Federal Rule of Civil Procedure 23 have been satisfied with respect to the Settlement Class and the proposed Settlement. Specifically, this Court finds that, with regard to the proposed Settlement Class, Rule 23(a) is satisfied in that:

1. The Settlement Class, as defined below, is so numerous that joinder of all members is impracticable. The undisputed record indicates that there are over 3.6 million members of the class.

2. There are questions of law and fact common to members of the Settlement Class in that all the allegations and claims in this matter arise from the operation of Facebook's Beacon program on third-party sites and its transmission of personal information to Facebook.

3. The representative Plaintiffs' claims are typical of the claims of members of the Settlement Class. Collectively, the representative Plaintiffs' claims implicate each of the defendants. More importantly, all of the named Plaintiffs' and Settlement Class Members' claims arise from the operation of the Beacon program—a common course of conduct resulting in the same or similar alleged injuries. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 2009 U.S. Dist. LEXIS 110407, 2009 WL 4263524 *4 (N.D. Cal.) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Although some claims of some Settlement Class Members arise from statutes unique to the third-party Beacon Merchants with whom they interacted, the more salient characteristic of the Class is the Beacon nexus and the statutory claims, such as the Electronic Communications Privacy Act (ECPA), common to all Class Members. These reasonably coextensive claims support typicality more than any disparities in particular statutory damages militate against it. *See Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("[t]he amount of damages is invariably an individual question and does not defeat class action treatment"); *see also In re SRAM Antitrust Litig.*, 2009 U.S. Dist. LEXIS 110407, 2009 WL 4263524 *4 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,

1020 (9th Cir. 1998); (compare Video Privacy Protection Act, Title 18, United States Code, section 2710(c)(2)(A) (liquidated damages of $ 2,500) and the ECPA Wiretap Act, Title 18, United States Code, section 2520(c)(2)(B) (statutory damages of whichever is the greater of $ 100 a day for each day of violation or $ 10,000)).

4. Settlement Class Counsel and class representatives have fairly and adequately protected the interests of the Settlement Class. By Order dated October 23, 2009, this Court, pursuant to Federal Rule of Civil Procedure 23(g), appointed Scott A. Kamber and David A. Stampley of KamberLaw, LLC and Joseph H. Malley of the Law Office of Joseph H. Malley, P.C., as Class Counsel for the Settlement Class, providing the Settlement Class with representation by nationally recognized members of the class action bar and significant experience in consumer privacy and technology matters. Counsel's efforts on behalf of the Class to reach a settlement included protracted arms-length negotiations for over a year as well as opposition to a motion to intervene. The attorneys of KamberLaw have made a showing that they possess experience and expertise in the areas of consumer privacy and technology matters and have professionally represented the interests of the Class in this matter.

G. Because certification is for settlement purposes only and not for litigation purposes, the Court need not consider whether the case, if tried, would present intractable manageability problems. Nonetheless, the Court finds that on the record presented that there would not be intractable manageability problems and, in fact, the class would be manageable given its unitary nature and the high likelihood of success in identifying Class Members.

With regard to the proposed Settlement Class, Rule 23(b)(3) is satisfied in that issues of law and fact common to the Class predominate over those affecting individual Class Members and that a class action is the superior method to adjudicate these claims.

H. The Court has held a hearing to consider the fairness, reasonableness and adequacy of Settlement, has been advised of all objections to and comments regarding the Settlement, and has given fair consideration to such objections and comments. The Court has reviewed the papers submitted by the parties and by all persons objecting to and commenting on the Settlement and has heard the arguments of those objectors to the Settlement appearing at the fairness hearing.

I. The Settlement, as provided for in the Settlement Agreement is fair, reasonable, adequate and proper and in the best interests of the Settlement Class. In reaching this conclusion, the Court has considered the record in its entirety, all objections and comments submitted to the Court, and the arguments of counsel for the parties and all other persons seeking to comment on the proposed Settlement.

The Court has considered a number of factors in its evaluation of the Settlement, including: (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement. *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

1. Regarding the strength of plaintiff's case, plaintiffs' claims implicate factual issues that would likely be vigorously disputed, such as the type and sufficiency of notice Class Members received about Beacon activity during specific time periods, the nature of Class Members' agreements with Facebook and the extent to which Beacon's transfer and distribution of personal information was legally unauthorized.

In addition, Plaintiffs' claims raise novel legal theories with little in the way of prior decisions to assist in gauging the likelihood of success. For example, regarding Blockbuster's liability under the VPPA, neither the parties nor objectors have brought to the Court's attention any cases in which plaintiffs have been awarded multiple liquidated damages. Facebook also has denied it is liable under the VPPA definition of "video tape service provider."

2. The contested facts and novelty of claims increase the likelihood of risk, expense, complexity and protracted duration of further litigation, which would be significant even without such factors.

Despite the brevity of the period of Beacon operation at issue, the parties would have had to conduct costly discovery of voluminous, not-easily-readable Internet transaction logs of highly-trafficked websites operated by numerous Defendants as well as defendant Facebook's software code for its Beacon functions, and to engage in extensive preparations for trial. This would have required significant time and expense in reviewing discovery materials with the assistance of experts and in preparing expert witness reports and expert witnesses for deposition and trial. Further, taking into consideration the number of defendants involved, bringing this case to trial would likely have been a long and costly proposition, the outcome of which would have been uncertain. This factor supports the fairness, reasonableness and adequacy of the Settlement.

3. The risk that a class action may be decertified at any time generally weighs in favor of approving a settlement. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 966 (9th Cir. 2009). Here, although there has been no specific showing that maintaining class action status throughout trial would be particularly difficult or problematic, the general risks and burdens on plaintiffs in doing so further support the propriety of the settlement.

4. In light of these litigation risks and in the context of settlements involving claims of infringement of consumers' privacy rights, the $ 9.5 million offered in settlement is substantial and, further, is directed toward a purpose closely related to Class Members' interests in this litigation. The objectors do not suggest otherwise, except to state that the "safety"

element of the Privacy Foundation charter is unrelated to the Class Members' claims. However, given the nexus of online privacy, safety and security, particularly as those values relate to the online threat landscape and the benefit of protecting consumers' identities and personal information online from those threats, the Privacy Foundation as constituted is sufficiently related to the claims raised by Class Members.

5. The court has also considered the extent of discovery completed and the stage of the proceedings. The parties have engaged in significant investigation, informal discovery and research, and have documented these efforts to the court, both at the Final Approval hearing as well as in the declaration of Scott A. Kamber, Dkt. 107. These efforts supplement the substantial information about Beacon that is already publicly known, including how it operates technically, the nature and timing of modifications to its data collection, and how Facebook interacted with the Facebook Beacon-Activated Affiliates. Such information places the Plaintiff Class in a position to make an informed decision about settlement. Class Counsel established that they acquired sufficient information to make an informed decision with respect to settlement, even though formal discovery is not complete. *See In re Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).

6. The next factor the Court has considered is the experience and views of counsel. The Court recognizes that the Settlement was only achieved after intense and protracted arm's-length

negotiations conducted in good faith and free from collusion, through the efforts of counsel with recognized experience in complex litigation involving technology and privacy issues such as those presented in this case. Class Counsel demonstrated an understanding of both the strengths and weaknesses of this case. See declaration of Class Counsel Scott A. Kamber, Dkt. 107. Based on the facts of the case and Class Counsel's experience in these types of cases, Class Counsels' reasonably concluded that the immediate benefits represented by the Settlement outweighed the possibility—perhaps remote—of obtaining a better result at trial, especially given the hurdles inherent in proving liability on behalf of the Settlement Class and the additional expense and delay inherent in any trial and likely subsequent appeals. This factor supports the fairness, reasonableness and adequacy of the Settlement.

7. Notice of the preliminary approval of this class action was provided pursuant to the Class Action Fairness Act of 2005. In addition, Class Counsel explained at the Final Approval hearing that they were contacted by, and spoke with, representatives of the attorneys general of four states and responded to their questions regarding the Settlement. No government agencies voiced objections or comments to the Court. In addition, the Settlement stands as the product of the efforts of Class Counsel, inasmuch as no attorneys general or federal regulatory personnel have announced actions regarding the Facebook Beacon issues present in this matter.

8. Only four Class members have objected to the substance of the settlement. The Court has also received and considered comments from certain privacy organizations. The objectors and commentators have criticized the fact that, under the Settlement, Class Members do not receive any direct monetary compensation. However, the only basis for compensation they have addressed at any length is that which would proceed from statutory damages awards. As discussed above, the expectation of such recovery is speculative at best, given the inherent and particular litigation risks the Class would face in proceeding to trial. If only moderate statutory damages were awarded, the effect on the fund of incurring administrative costs to distribute de minimis amounts per Class Member leads to the conclusion that the certainty of the Settlement, as constituted, provides more meaningful relief to the Class.

Further, the objectors have suggested that the claims in the Harris action were too valuable to be released through this Settlement. The Harris Plaintiffs, however, now join in the motion for approval, having investigated and evaluated this Settlement, and following the efforts of Class Counsel in this matter to assist the Harris plaintiffs in resolving their case against Blockbuster. As this Court found in denying the Harris Plaintiffs' motion to intervene prior to Preliminary Approval, "[H]aving pursued their own claims against Blockbuster relating to these same operative events, Proposed Intervenors are already uniquely equipped to present informed analysis as to Blockbuster's potential liability . . . ." Order Denying Motion for Leave to Intervene, Dkt. 66.

Finally, the argument most strongly pressed by the objectors and the commentators is that the Privacy Foundation created by the Settlement is both unnecessary and unduly subject to the influence and control of Facebook. Although theoretical efficiencies might arise from giving the settlement funds to an existing organization rather than by creating a new entity, that possibility does undermine the conclusion that the Settlement is fair and adequate. As to the independence of the Privacy Foundation, the objectors' arguments appear to rest on a premise that no aspect of the organization's structure, and no future use of its funds, should in any way be potentially consistent with Facebook's own interests. Settlements in litigation very often rest on the participants' abilities to find non-zero sum game solutions. Thus, while it likely would be inappropriate to apply settlement funds in a manner that was solely or primarily for the benefit of the defendant, there is no requirement that the funds be used in a manner wholly antagonistic to the defendant's interests. In this context, the parties have demonstrated that the structure of the Privacy Foundation, and the individuals who will be involved with it, are sufficient to ensure that the settlement funds will be disbursed in a manner that furthers the interests of the Class, and the public at large, consistent with the interests pursued by plaintiffs in this litigation.

Objectors have not shown there is any substantial reason to doubt the independence of two of the three directors. The unanimity requirement for board votes is applicable only to structural changes, and not to funding decisions. While the director associated with Facebook may reasonably be expected to exercise his influence against the Foundation taking any actions that would clearly and directly harm Facebook, there has been no persuasive showing that the Foundation will be a mere publicity tool for Facebook, or in any meaningful sense under Facebook's direct control. To the extent objectors are arguing that that Foundation could be structured somewhat differently, or that it would be even better for the funds to go to some existing organization, such fine-tuning of the settlement reached by the parties is beyond the purview of the Court. "Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027.

The fact that only a few Class Members object to the proposed settlement further militates in favor of approval. *In re Mego*, 213 F.3d at 459. In addition, the fact that an overwhelming majority of the class willingly approves a settlement and remains in the class also indicates fairness. *Hanlon*, 150 F.3d at 1027. Here, given only four substantive objections and slightly more than 100 opt-outs from over 3.6 million Class Members, this factor favors a finding of fairness, reasonableness and adequacy.

J. The Court further finds that the Class representatives are entitled to and shall receive incentive awards for their efforts on behalf of the

Class in this litigation and in obtaining this Settlement. Class representative Sean Lane shall receive an award of $ 10,000.00 due to the significant time and effort that he devoted to seeking the recovery obtained for the class, representatives Mohannaed Sheikha and Sean Martin shall receive an award of $ 5000.00 each for their significant time and efforts, and the remaining named representatives shall receive $ 1,000.00 for their efforts and time.

K. The Court will issue a further order with respect to an award of attorney fees and costs.

IT IS SO ORDERED.

Dated: 03/17/2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

SEAN LANE, et al., Plaintiffs v. FACEBOOK, INC., et al., Defendants.

No. C 08-3845 RS

May 24, 2010, Decided

May 24, 2010, Filed

ORDER RE ATTORNEY FEES

I. INTRODUCTION

The parties negotiated a settlement of this class action, which has received final approval after notice to the class. Remaining to be decided is the application for attorney fees brought by plaintiffs' counsel. The fee motion is unusual, because not only does it seek fees for the efforts made by plaintiffs' counsel in this action, it also seeks fees for work done by plaintiffs' counsel in *Harris v. Blockbuster*, a proceeding in the Northern District of Texas arising from the same events. The motion fails to establish any legitimate grounds for awarding fees for efforts undertaken by other attorneys in another case, particularly given that those attorneys attempted to derail the settlement of this action at the preliminary approval stage, before later coming to support it.

Because the fee request is otherwise reasonable, the motion will be granted, but with that portion of the fee claim attributable to the *Harris* counsel excised.

II. DISCUSSION[1]

The parties' settlement agreement provided that plaintiffs' counsel could apply for, and Facebook would not oppose, attorney fees and costs of up to one-third of the dollar amount being paid by Facebook under the settlement—or roughly $3.17 million dollars. Counsel has in fact applied for an award of fees in the amount of $2.828 million, plus costs of $42,210.58.

Plaintiffs contend that California law governs the fee award because their claims sounded in state law. *See Champion Produce, Inc. v. Ruby Robinson Co. Inc.*, 342 F.3d 1016, 1024 (9th Cir. 2003) ("An award of attorneys' fees incurred in a suit based on state substantive law is generally governed by state law."); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) ("[b]ecause Washington law governed the claim, it also governs the award of fees."). Here, however, plaintiffs asserted both state and federal claims, so it is not entirely clear that the fee award should be evaluated under state law. As plaintiffs acknowledge, however, the approach taken by California courts is virtually identical to that taken by the Ninth Circuit; under either jurisprudence

[1] The factual background of this action has been described in prior orders and will not be repeated here.

the starting point is calculating a "lodestar," by multiplying the number of hours reasonably spent in achieving the results obtained by a reasonable hourly rate. *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995); *Lealao v. Beneficial Cal., Inc.*, 82 Cal.App.4th 19, 26 (2000).[2]

Plaintiffs seek a lodestar of $1,161,381.50, representing approximately 2500 hours of work, distributed among three law firms. Although the motion originally was not supported by sufficient detail regarding the tasks performed to permit an analysis of its reasonableness, plaintiffs subsequently submitted an additional declaration as well as detailed time records, provided in camera. Upon review of the record, the Court finds that the total time and expenses incurred by plaintiffs' counsel were reasonable in light of the work undertaken and the results achieved. The Court has further considered the geographic location and experience of the attorneys who worked on this matter and finds that the hourly rates charged by counsel and reflected in the fee application are reasonable. Accordingly, the proposed lodestar of $1,161,381.50 will be adopted.

As noted above, the fee application proposes adding to this lodestar an amount based on the efforts undertaken by the *Harris* plaintiffs' counsel in that action. Specifically, plaintiffs assert that *Harris*

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[2] Plaintiffs assert that there is greater latitude in applying a multiplier to the lodestar under state law than federal, but they argue their request here is proper under either.

counsel incurred a lodestar of approximately $825,000, and they advocate allocating 30% of that as a basis to increase the lodestar in this action to a little over $1.4 million. Plaintiffs offer no authority to support this novel suggestion. Even assuming that *Harris* counsel's efforts resulted in benefits to persons who are class members here as well as in that case, counsel must seek compensation for those efforts in the action in which they took place. Indeed, the only efforts *Harris* counsel undertook in this case were directed at preventing preliminary approval of the settlement. While *Harris* counsel may have believed at the time that those efforts were in the interests of the class, they cannot expect to be paid from the settlement funds for opposing the settlement, particularly since they ultimately supported the settlement, with no material changes in its terms.

The final issue is what multiplier, if any, should be applied to the lodestar. With the inclusion of the *Harris* counsel's hours in the lodestar, plaintiffs argue for a multiplier of 2, which they describe as "reasonable and warranted." Plaintiffs suggest, however, that if the Court is not inclined to include the *Harris* hours in the lodestar, then it should apply a multiplier of 2.4, to reach the same total fee award.

The Court is satisfied that application of a multiplier is warranted under the circumstances here. See *In re Washington Public Power Supply System Securities Litigation*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994). Plaintiffs' suggestion, however, to apply a 2.4 multiplier as a means to ensure the same result as if the *Harris* hours were included in the lodestar is disturbingly cynical. Having concluded that those hours should not be compensated in this action as part of the lodestar, the Court will not provide compensation for those hours by labeling it as something else. Accordingly, a multiplier of 2 will be applied.

III. CONCLUSION

The motion for an award of attorney fees and costs is granted in part. Plaintiffs' counsel shall recover from the settlement funds attorney fees of $2,322,763.00 and costs of $42,210.58, for a total award of $2,364,973.58.

Dated: May 24, 2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

SEAN LANE, et al., Plaintiffs v. FACEBOOK, INC., et al., Defendants.

No. C 08-3845 RS

May 27, 2010, Decided

May 27, 2010, Filed

FINAL JUDGMENT AND ORDER OF DISMISSAL

Pursuant to this Court's Findings of Fact, Conclusions of Law, and Order Approving Settlement of March 17, 2010 (the "Final Approval Order") and Order re Attorneys' Fees of May 24, 2010 (the "Attorneys' Fees Order"), which are incorporated herin by reference,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

A. This Judgment incorporates by reference the definitions of the Settlement Agreement dated as of September 17, 2009 (the "Settlement Agreement"), and all defined terms used herein shall have the same meanings as set forth in the Settlement Agreement.

B. Pursuant to Federal Rule of Civil Procedure 54(b), there is no just reason for delay and final judgment is entered as to all defendants in the Litigation.

C. Pursuant to Federal Rule of Civil Procedure 23, this Court hereby affirms its findings and conclusions, set forth in the Preliminary Approval and Notice Order as well as its Final Approval Order that, for purposes of the Settlement Agreement and Settlement, this Class meets the prerequisites for maintenance of a class action under Rule 23. The Court hereby makes final its previously conditional certification of the Class.

D. The Court finds that, during the course of the Litigation, the Parties and their respective counsel at all times complied with the requirements of Federal Rule of Civil Procedure 11 and that the Settlement Agreement is the product of good-faith negotiations.

E. This Court, having approved the Settlement, having found the Settlement to be fair, reasonable, and adequate in all respects for the Class pursuant to Federal Rule of Civil Procedure 23(e), having found the Settlement Agreement and the Settlement to be fair, reasonable and adequate as to the Parties, and granting final approval of the Settlement Agreement and the Settlement in all respects, hereby directs the Parties to peform the terms of the Settlement Agreement.

F. As to all Protected Persons, this Court hereby dismisses the Litigation in its entirety with prejudice and without costs (except as otherwise expressly provided in the Settlement Agreement and by other order of the Court).

G.Notwithstanding the foregoing, this Judgment does not dismiss any of the individual claims asserted by any persons or entities, identified in Exhibit A to the Court's Final Approval Order (Dkt. No. 123, p. 12), who validly and timely requested exclusion from the Settlement Class as provided for in the Preliminary Approval and Notice Order, and persons so identified shall not share in the benefits of the Settlement. In addition, this Final Judgment does not affect their legal rights to pursue any claims they may have against Defendants. With regard to all other members of the Class, such Class Members are hereinafter barred and permanently enjoined from prosecuting further the Released Claims against Protected Persons.

H. As set forth in paragraphs 5.1-5.4 of the Settlement Agreement, upon the Effective Date, the Representative Plaintiffs and each and every one of the Class Members shall be deemed to have and by operation of this Judgment shall have fully, finally, and forever released, relinquished, and discharged the Protected Persons from all Released Claims.

I. Neither Class Counsel's application for attorneys' fees and reimbursement of expenses nor any order entered by this Court thereon, including the Attorneys' Fees Order, shall in any way disturb or affect this Judgment, and all such matters shall be construed separately from this Judgment. Notwithstanding the dismissal of the Litgation, there shall be no claims or awards of any costs, attorneys' fees, or expense to be paid by Class Counsel or from the Settlement Fund except as expressly set forth in the orders of this Court.

J. Neither the Settlement Agreement nor the Settlement nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the Settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any Released Claims, of any wrongdoing or liability of Protected Persons, or a finding or evidence that any claims that either were brought or could have been brought in the Litigation are appropriate for class treatment or that any requirement for class certification is or could otherwise be satisfied; or (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of Protected Persons in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal.

K. Protected Persons may file this Judgment and/or the Settlement Agreement from this action in any other action that may be brought against them in order to support a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good-faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim. Protected Persons may rely on this Judgment and/or the Settlement Agreement from this action to seek a dismissal of any claim brought against Facebook or any of the Protected Persons, in any court whatsoever, which derives from the Released Claims.

L. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over (i) implementation of the Settlement; (ii) distribution or disposition of the Settlement Fund; (iii) further proceedings, if necessary, on applications for attorneys' fees, expenses, and costs in connection with the Litigation and the Settlement; and (d) the parties for the purpose of construing, enforcing and administering the Settlement Agreement.

IT IS SO ORDERED

Dated: May 27, 2010

/s/ Richard Seeborg

RICHARD SEEBORG

UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE NINTH CIRCUIT

Argued October 12, 2011 Filed February 26, 2013

No. 10-16380, No. 10-16398

SEAN LANE; MOHANNAED SHEIKHA; SEAN MARTIN; ALI SAMMOUR; MOHAMMAED ZIDAN; SARA KARROW; COLBY HENSON; DENTON HUNKER; FIRAS SHEIKHA; HASSEN SHEIKHA; LINDA STEWART; TINA TRAN; MATTHEW SMITH; ERICA PARNELL; JOHN CONWAY; PHILLIP HUERTA; ALICIA HUNKER; MEGAN LYNN HANCOCK, a minor, by and through her parent Rebecca Holey; AUSTIN MUHS; CATHERINE HARRIS; MARIO HERRERA; MARYAM HOSSEINY, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. FACEBOOK, INC., a Delaware corporation; BLOCKBUSTER, INC., a Delaware corporation; FANDANGO, INC., a Delaware corporation; HOTWIRE, INC., a Delaware corporation; STA TRAVEL, INC., a Delaware corporation; OVERSTOCK.COM, INC., a Delaware corporation; ZAPPOS.COM, INC., a Delaware corporation; GAMEFLY, INC., a Delaware corporation, Defendants-Appellees, GINGER MCCALL, Class Member, Objector-Appellant. SEAN LANE; MOHANNAED SHEIKHA; SEAN MARTIN, individually, and on behalf of themselves and all others similarly situated; ALI SAMMOUR; MOHAMMAED ZIDAN; SARA KARROW; COLBY HENSON; DENTON HUNKER; FIRAS SHEIKHA; HASSEN SHEIKHA; LINDA STEWART; TINA

TRAN; MATTHEW SMITH; ERICA PARNELL; JOHN CONWAY; PHILLIP HUERTA; ALICIA HUNKER; MEGAN LYNN HANCOCK, a minor, by and through her parent Rebecca Holey; AUSTIN MUHS; CATHERINE HARRIS; MARIO HERRERA; MARYAM HOSSEINY, individually and on behalf of themselves and all others similarly situated, Plaintiffs-Appellees, v. FACEBOOK, INC., a Delaware corporation; BLOCKBUSTER, INC., a Delaware corporation; HOTWIRE, INC., a Delaware corporation; FANDANGO, INC., a Delaware corporation; STA TRAVEL, INC., a Delaware corporation; OVERSTOCK.COM, INC., a Delaware corporation; ZAPPOS.COM, INC., a Delaware corporation; GAMEFLY, INC., a Delaware corporation, Defendants-Appellees, MEGAN MAREK; BENJAMIN TROTTER, Class Members, Objectors-Appellants.

Michael H. Page, Public Citizen Litigation Group, Washington, D.C.; Steven F. Helfand, Helfand Law Offices, San Francisco, California, for the objectors-appellants.

Scott A. Kamber, Kamber Law, LLC, New York, New York, for the plaintiffs-appellees.

Michael G. Rhodes, Cooley LLP, San Francisco, California, for the defendants-appellees.

JUDGES: Before: Procter Hug, Jr., Andrew J. Kleinfeld, and William A. Fletcher, Circuit Judges. Order; Dissent to Order by Judge Milan D. Smith, Jr..

OPINION

ORDER

Judges Hug and W. Fletcher have voted to deny appellants' petitions for rehearing. Judge Kleinfeld has voted to grant the petitions for rehearing. Judge W. Fletcher has voted to deny the petitions for rehearing en banc and Judge Hug has so recommended. Judge Kleinfeld would grant the petitions for rehearing en banc.

The full court was advised of the petitions for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing and the petitions for rehearing en banc are DENIED. Judge M. Smith's dissent from the denial of en banc rehearing is filed concurrently herewith.

DISSENT

M. SMITH, Circuit Judge, with whom KOZINSKI, Chief Judge, and O'SCANNLAIN, BYBEE, BEA, and IKUTA, Circuit Judges, join, dissenting from the denial of rehearing en banc:

Class action litigants are increasingly likely to employ the doctrine of cy pres to settle complex class actions.[1] Until recently, courts in our circuit were well-positioned to address the issues associated with this trend because our cy pres jurisprudence was clear. Under a line of cases beginning with *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), we required that a cy pres award (1) be reasonably certain to benefit the class, and (2) advance the objectives of the statutes relied upon in bringing suit. *See also Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012). By approving a settlement that fails both criteria, however, the majority in this case creates a significant loophole in our case law that will confuse litigants and judges, while endorsing cy pres settlements that in no way benefit class members. I therefore respectfully dissent from our unfortunate failure to rehear this case en banc.

I.

We require district judges to be reasonably certain that class members will benefit before approving a cy pres settlement. *Six (6) Mexican Workers*, 904 F.2d at 1308. We have counseled that the "choice of charity and its relation to the class members and class claims—or lack thereof—figure[s] heavily in

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[1] See, e.g., Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 620 (2010) (discussing the "dramatic turn in modern class actions toward the use of cy pres relief").

our analysis." *Dennis*, 697 F.3d at 865 (emphasis added). Thus, we have rejected settlements where the selected charity lacks "a substantial record of service" in remedying the types of wrongs alleged, or where the selected charity is not sufficiently "limited in its choice of projects" to ensure that class members will truly be benefitted by its works. *Id.* (quoting *Six (6) Mexican Workers*, 904 F.2d at 1308). The majority, however, failed to apply these safeguards.

First, the selected cy pres beneficiary, the Digital Trust Foundation (DTF), has no record of service. *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012). The "charity" is simply a bespoke creation of this settlement. The majority is apparently untroubled by this. It attempts to distinguish our case law emphasizing the importance of a charity's record of service by noting that in those cases "there was no way of knowing whether the organization would use the funds to the benefit of class members," while here "the settlement agreement and DTF's Articles of Incorporation tell us exactly how funds will be used." *Lane*, 696 F.3d at 822. Respectfully, they do no such thing.

The DTF has made a written commitment to "fund and sponsor programs designed to educate users, regulators[,] and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats." *Id.* However one might describe this mission statement, "limited" is not the word that comes to mind. *See, e.g., Dennis*, 697 F.3d at 865. DTF promises to fund and sponsor "programs" that address "critical issues" relating to Internet privacy. But neither the "programs" nor the "issues" are defined with any specificity, and certainly not the specificity necessary to be reasonably certain that class members will actually benefit from these activities.

Frequent NPR listeners know that the MacArthur Foundation's open-ended mission statement indicates that it is "committed to building a more just, verdant, and peaceful world." MacArthur Foundation, http://www.macfound.org/about (last visited February 18, 2013). But that is no guarantee that a donation to the MacArthur Foundation will actually result in, or advance, justice, verdancy, or peace. Rather, a potential donor must look to other factors, such as the MacArthur Foundation's past record of service or its specific list of projects, to determine whether it is reasonably certain that a donation will truly bring about the promised effects. That the DTF is committed to funding "programs" regarding "critical issues" says absolutely nothing about whether class members will truly benefit from this settlement; it simply promises that DTF will do some "stuff" regarding some more "critical stuff." If fashioning an open-ended, one-sentence mission statement is all it takes to earn cy pres settlement approval in our court, we have completely eviscerated the meaning of our previously controlling case law.

II.

The majority also undercuts our precedent requiring cy pres money to be spent in a manner that advances the "objectives of the underlying statutes." *Nachshin*, 663 F.3d at 1036. But DTF's receipt of these settlement funds, even if unobjectionable in all other respects, simply does not advance the objectives of the statutes upon which plaintiffs relied in their suit.

Here, the plaintiffs brought claims under the Electronic Communications Privacy Act, 18 U.S.C. § 2510; the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; the Video Privacy Protection Act, 18 U.S.C. § 2710; the California Consumer Legal Remedies Act, Cal. Civ. Code § 1750; and the California Computer Crime Law, Cal. Penal Code § 502. With the exception of the California Consumer Legal Remedies Act, these statutes all share a common purpose—preventing the unauthorized access or disclosure of private information. Yet the DTF's sole stated purpose is to "educate users, regulators[,] and enterprises" on how to protect Internet privacy "through user control." *Lane*, 696 F.3d at 822 (emphasis added). Plaintiffs' claims, however, have nothing to do with users' lack of "education" or "control." Instead, they relate to misconduct by Internet companies that wrongfully exposes private information in ways that even educated users cannot anticipate, prevent, or direct.

Our precedent holds that it is not enough simply to identify any link between the class claims and a cy pres distribution, such as whether both concern food

(*Dennis*) or the Internet (*Lane*). Instead, an appropriate cy pres recipient must be dedicated to protecting consumers from the precise wrongful conduct about which plaintiffs complain. *See Dennis*, 697 F.3d at 867. But an organization that focuses on protecting privacy solely through "user control" can never prevent unauthorized access or disclosure of private information where the alleged wrongdoer already has unfettered access to a user's records. The DTF can teach Facebook users how to create strong passwords, tinker with their privacy settings, and generally be more cautious online, but it can't teach users how to protect themselves from Facebook's deliberate misconduct. Unless of course the DTF teaches Facebook users not to use Facebook. That seems unlikely.

I regret the muddle this case makes of our cy pres jurisprudence, and I respectfully dissent from our failure to rehear this case en banc.